Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SETH E. SICROFF,

Petitioner,

v.

STEPHEN C. JETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debt for libel is nondischargeable under Section 523(a)(6) of the Bankruptcy Code, which exempts from the discharge debts for "willful and malicious injury," when the debtor believed the libelous statement to be true when it was made.

PARTIES TO THE PROCEEDING

The petitioner is Seth E. Sicroff, the debtor and defendant-appellee in the courts below. The respondent is Stephen C. Jett, plaintiff-appellant in the courts below. The Office of the United States Trustee was denominated as a party to the proceedings in the Court of Appeals but did not participate in the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Seth E. Sicroff respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the district court, is reported at ___ F.3d ___, 2005 WL 665251 (9th Cir. Mar. 23, 2005), and is reproduced at App. 1a–11a. The opinion of the United States District Court for the Eastern District of California, affirming the judgment of the bankruptcy court, is unreported and is reproduced at App. 13a–23a. The opinion of the United States Bankruptcy Court for the Eastern District of California is unreported and is reproduced at App. 25a–27a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 523(a) of the Bankruptcy Code provides in pertinent part:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt— . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity..

11 U.S.C. § 523(a).

INTRODUCTION

The fundamental purpose of the bankruptcy laws is to provide the debtor with a fresh start. *See, e.g., Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). To that end, the Bankruptcy Code provides that an eligible individual debtor who fulfills the Code's requirements will receive a discharge of his prepetition indebtedness. *See* 11 U.S.C. § 727. Although Section 523(a) of the Bankruptcy Code sets out certain exceptions to that rule, those exceptions are strictly construed and "should be confined to those plainly expressed." *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915).

The exception at issue in this case provides that debts for "willful and malicious injury by the debtor" are nondischargeable. 11 U.S.C. § 523(a)(6). In *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998), this Court held that the "willful and malicious injury" exception applies only if the debtor had "the actual intent to cause injury," and that an injury is not "willful and malicious" merely because it results from "a deliberate or intentional *act*." *Id.* at 61 (emphasis in original). Accordingly, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64.

In this case, the Ninth Circuit held that a debt for libel was a debt for "willful and malicious injury" and thus non-dischargeable under § 523(a)(6). It did so even though the bankruptcy court had made a factual finding—undisturbed on appeal—that the debtor believed his statements to be true when he published them. And it did so even though California law requires no more than a finding of negligence as to truth or falsity to support a libel verdict—and no court below ever found (or suggested that the record would support a finding) that the debtor was more than negligent in believing his statements to be true.

The Ninth Circuit reached that holding only by employing a tortured analysis of the "willful and malicious injury" exception that conflicts with the analysis employed by other courts of appeals and with this Court's decision in *Geiger*. Disaggregating the "willful" and "malicious" elements of the exemption, the Ninth Circuit first held that the "willful" element was satisfied based on the debtor's concession that he had intentionally published the statements in question. App. 8a. The court then declared—relying on pre-*Geiger* case law—that the injury was "malicious" because the act of publication was intentional, caused injury to reputation, and was done "without just cause and excuse." App. 8a–10a. The court made clear that, in determining whether the libelous statements were "malicious," it did not inquire into whether Sicroff intended to cause legally cognizable injury to Jett. App. 8a–9a.

The Ninth Circuit's analysis was premised on a misguided, and unduly narrow, interpretation of this Court's decision in *Geiger*. Although *Geiger* made quite clear that an injury is "willful and malicious" *only* if the debtor intended to cause legal injury, and not if the debtor acted negligently or even recklessly, the Ninth Circuit wholly failed to acknowledge that holding. And it implausibly read *Geiger* to leave intact much of the Ninth Circuit's pre-*Geiger* caselaw, under which conduct was "malicious" if it lacked "just cause and excuse," and no intent to injure was required.

By contrast, the Fifth Circuit has given much broader effect to *Geiger*, holding that the "lacking just cause and ex-

cuse" standard for malice—widely employed prior to *Geiger*—did not survive that decision. *See Miller* v. *J.D. Abrams Inc.* (*In re Miller*), 156 F.3d 598, 605-606 (5th Cir. 1998). Rather, as the Fifth Circuit has explained, in order for an injury to be either "willful" or "malicious," *Geiger* requires a showing that legal injury was actually intended by the debtor or so certain to result that the injury is deemed intentional. *See id.* at 606. The Ninth Circuit panel below acknowledged the conflict of authority and expressly rejected the Fifth Circuit's reading of *Geiger*. App. 10a n.4.

Similarly, the decision below is in direct conflict with the Sixth Circuit's decision in *Wheeler* v. *Laudani*, 783 F.2d 610 (6th Cir. 1986), which held that a defamatory statement is "willful and malicious injury" under § 523(a)(6) only if the debtor knew the statement was false when it was made. *See id.* at 615. It is also at odds with the Sixth Circuit's decision in *Kennedy* v. *Mustaine* (*In re Kennedy*), 249 F.3d 576 (6th Cir. 2001), which held that a libel debt was nondischargeable precisely because the debtors continued to make their statements even after receiving clear proof that the statements were false. *See id.* at 581, 582-583.

The Ninth Circuit's decision saps *Geiger* of its meaning. Under the decision below, an injury is "willful" so long as it proceeds from an intentional act. Likewise, as the panel declared, under its definition of "malicious," "it is the wrongful act that must be committed intentionally rather than the injury itself." App. 8a–9a. Under this analysis, nondischargeability becomes the rule, to be overcome only upon a showing of "just cause or excuse."

For all these reasons, this Court should grant certiorari to review the Ninth Circuit decision below.

STATEMENT OF THE CASE

1. Petitioner Sicroff was a graduate student in the Geography Department at the University of California at Davis. Protesting the university's decision to close the department, he wrote a letter to various university officials, with copies to the local newspapers. Claiming to reveal the "real motivation" for closing the department, Sicroff wrote:

> [T]he old guard of the geography department has plagued [the administration] with a continuous barrage of specious complaints about [the new department chair]. In particular, Prof. Stephen Jett and Prof. Conrad Bahre have been relentless in their accusations against the new chairperson, even while they themselves have been the subject of numerous and well-substantiated charges of unprofessional conduct.
>
> Too weak to fire or even discipline tenured faculty, no matter how serious their misbehavior, you have taken this opportunity to rid yourself of a burr under your saddle. Shame on you, and shame on us all if we put up with it!

App. 2a–3a.

2. Based largely on the statements contained in the letter, Conrad Bahre and Stephen Jett (the Respondent) filed suit in California state court, alleging, as relevant here, that Sicroff's letter constituted libel under California law.[1]

Before the case was set for trial on the merits of the libel claim, Sicroff filed for bankruptcy under chapter 7 of the Bankruptcy Code, which had the effect of staying the state court litigation. *See* 11 U.S.C. § 362. Jett and Bahre thereupon initiated adversary proceedings in the bankruptcy case, seeking a determination that the debt Sicroff owed them was nondischargeable under 11 U.S.C. § 523(a)(6), which provides that a debt "for willful and malicious injury" is exempted from the bankruptcy discharge.[2]

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[1] The Sacramento County Superior Court referred the state law suit to binding arbitration. The arbitrator concluded that Sicroff had made defamatory statements against Jett and Bahre, and awarded both compensatory and punitive damages. On appeal, the state appellate court reversed the judgment—ruling that the trial court, in sending the case to binding arbitration over Sicroff's objection, had improperly denied him his right to a jury trial—and remanded for further proceedings.

[2] The bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 1334(b), which grants the district courts jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11," and 28 U.S.C. § 157, which grants the dis-

On motion by Jett and Bahre, the bankruptcy court lifted the stay, permitting further proceedings in state court. A settlement conference, however, was unsuccessful, and the state court ultimately determined to stay further proceedings on the underlying defamation claim pending a resolution of the nondischargeability adversary proceeding in the bankruptcy court.[3]

3. The bankruptcy court held a hearing on the nondischargeability issue. At the hearing, counsel for Jett contended that because Sicroff had intentionally made and published his statements, his conduct was willful, and that because libel was inherently malicious, his conduct was also malicious. Counsel for Sicroff conceded that Sicroff had intentionally made and published his statements regarding Jett, and that in this sense his conduct was "willful," but argued that Sicroff's mental state was not "malicious" within the meaning of § 523(a)(6) because Sicroff believed that the statements were true when he made them.

The bankruptcy court concluded that certain of Sicroff's statements about Jett were false, but held that the statements did not constitute "willful and malicious injury," because "[w]hile there can be no doubt that [Sicroff] intentionally and repeatedly published his untrue statements about [Jett], the evidence tends to show that he believed those statements were true." App. 26a–27a. The district court affirmed. App. 13a–23a.

4. The Ninth Circuit reversed. App. 1a–11a. The Ninth Circuit first concluded that the statements in Sicroff's letter constituted libel under California law, which defines libel simply as "a false and unprivileged publication by writing [or other means], which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be

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trict courts the power to refer such proceedings to the bankruptcy courts for that district, *see id.* § 157(a), and empowers bankruptcy judges to hear and determine, *inter alia*, "determinations as to the dischargeability of particular debts," *id.* § 157(b)(2)(I).

[3] Bahre subsequently dismissed his claims against Sicroff, leaving Jett as the only plaintiff.

shunned or avoided, or which has a tendency to injure him in his occupation." App. 6a (quoting Cal. Civ. Code § 45).[4]

Turning to the nondischargeability issue, the Ninth Circuit first noted that "[w]e analyze the willful and malicious prongs of the dischargeability test separately." App. 8a. Relying on Sicroff's acknowledgment that he had intended to make the statements in question, the panel reasoned that Sicroff had "conceded that his behavior was 'willful and intentional.'" *Id.* It thus concluded that Sicroff had inflicted "willful" injury on Jett, and that the bankruptcy court's contrary determination "was clearly erroneous." *Id.*

The Ninth Circuit then turned to the "malicious" prong. The panel reasoned that under its circuit precedent, an act is "malicious" within the meaning of § 523(a)(6) when it is "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." App. 8a (quoting *Petralia* v. *Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001)). The panel stressed that "[w]ithin the plain meaning of this definition, it is the wrongful act that must be committed intentionally rather than the injury itself." App. 8a–9a (citing *Murray* v. *Bammer* (*In re Bammer*), 131 F.3d 788, 791 (9th Cir. 1997)).

Reasoning that a "libelous act, by its nature, is self-evidently wrongful and is committed by an intentional act of publication," the Ninth Circuit concluded that the first two prongs of this test were satisfied. App. 9a. As for the third element, the court concluded that "Sicroff's statements were directed at Jett's professional reputation and, therefore, will necessarily harm him in his occupation." *Id.* The court therefore reasoned that the "malice" inquiry turned on whether Sicroff had "just cause and excuse" for making the statements in question. *Id.*

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[4] While the California libel statute by its terms would impose strict liability for defamation, following this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the California Supreme Court has interpreted the statute to require private-figure plaintiffs to show that the defendant was at least negligent as to the truth or falsity of the matter asserted. *See Brown* v. *Kelly Broad. Co.*, 771 P.2d 406, 425 (Cal. 1989).

The court found that Sicroff did not have "just cause and excuse" for his actions, because after the newspaper edited out the references to Jett, he offered to identify the subject of his criticisms. App. 9a–10a. "This action demonstrates a specific intent to injure Jett over and above otherwise legitimate protest." App. 10a. Accordingly, the Ninth Circuit concluded that "Sicroff's libelous statements constituted a willful and malicious injury" and that "his debt to Jett is not dischargeable." App. 11a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS

Under the Ninth Circuit's reading of § 523(a)(6), a negligently made libelous statement is "willful and malicious"—and a resulting debt is thus nondischargeable in bankruptcy—even if the debtor believed his statements to be true and thus could not have intended to inflict any legally cognizable injury on the plaintiff.

That expansive construction of the "willful and malicious" exception to discharge presents a square and expressly acknowledged conflict with the Fifth Circuit's interpretation of that provision, under which an injury is neither "willful" nor "malicious" unless the debtor had the actual intent to cause legally cognizable injury. *See Miller* v. *J.D. Abrams Inc.* (*In re Miller*), 156 F.3d 598, 606 (5th Cir. 1998). It also decisively breaks with the Sixth Circuit, which has expressly held that a debt for libel cannot be a debt for "willful and malicious injury" if the debtor believed his statements to be true when they were made. *See Wheeler* v. *Laudani*, 783 F.2d 610, 615 (6th Cir. 1986); *see also Kennedy* v. *Mustaine* (*In re Kennedy*), 249 F.3d 576, 581, 582-583 (6th Cir. 2001) (finding debt for libel nondischargeable because debtors knew libelous statements were false).

A. The Ninth Circuit's construction of the "malicious injury" requirement, under which an injury may be malicious even if the debtor was merely negligent and had no intent to cause legally cognizable injury, presents a square conflict with the Fifth Circuit's holding that to satisfy the

"malicious" requirement, legally cognizable injury must have actually been intended by the debtor or so certain to result that the injury is deemed intentional. *See Miller*, 156 F.3d at 606. Negligent torts such as the one in this case cannot satisfy that standard. *See id.* at 603, 606. This openly acknowledged conflict—which was outcome-determinative in this case—represents an important disagreement about the meaning and application of this Court's decision in *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998).

Prior to this Court's decision in *Geiger*, a number of courts of appeals (the Fifth and Ninth Circuits among them) treated "willful" and "malicious" as analytically separate requirements. *See Miller*, 156 F.3d at 603 (noting that prior to *Geiger*, "courts . . . analyzed 'willful' and 'malicious' separately"); *Murray* v. *Bammer* (*In re Bammer*), 131 F.3d 788, 791 (9th Cir. 1997).

In the Ninth Circuit, prior to *Geiger*, an injury was "willful" if it stemmed from a "deliberate and intentional" act; intent to injure was not required. *See, e.g.*, *Impulsora del Territoria Sur, S.A. v. Cecchini* (*In re Cecchini*), 780 F.2d 1440, 1443 (9th Cir. 1986). An injury was "malicious" if it involved "(1) a wrongful act, (2) done intentionally, (3) which necessarily cause[d] injury, and (4) [was] done without just cause or excuse." *Bammer*, 131 F.3d at 791 (citation and internal quotation marks omitted). Again, "malicious" injury did not require "an intent to injure, but . . . only an intentional act which causes injury." *Id.*

Geiger rejected that analysis, holding that the "willful and malicious injury" exception contemplates "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Geiger*, 523 U.S. at 61 (emphasis in original). As the Fifth Circuit has observed, however, *Geiger* "never makes explicit whether it is analyzing solely the 'willful' prong or the 'willful and malicious' standard as a unit." *Miller*, 156 F.3d at 606.

Apparently for that reason, the Ninth Circuit has given *Geiger* an exceedingly narrow construction—understanding it to leave intact all of the Ninth Circuit's pre-*Geiger* case

law regarding the meaning of "malicious." Accordingly, it has continued to bifurcate the willfulness and malice inquiries, and has continued to employ its pre-*Geiger* definition of "malicious" injury as an intentional wrongful act done without just cause and excuse—without requiring any showing of intent to cause injury to satisfy the "malicious" prong. App. 8a–9a (citing *Bammer*, 131 F.3d at 791). Applying that analysis in this case, the Ninth Circuit concluded that Sicroff's act was "malicious" despite the bankruptcy court's undisturbed finding that Sicroff believed his statements to be true.

This result would have been impossible in the Fifth Circuit, which has given far broader effect to the *Geiger* decision. Prior to *Geiger*, the Fifth Circuit had employed a test for malice very similar to the Ninth Circuit's, under which conduct was "malicious" if it was "without just cause or excuse." *Miller*, 156 F.3d at 605 (quoting *Vickers* v. *Home Indem. Co.*, 546 F.2d 1149, 1150 (5th Cir. 1977)).

After *Geiger*, however, the Fifth Circuit held that *Geiger* had overruled that line of authority. It concluded that, after *Geiger*, "willful and malicious injury" is "a unitary concept," *Miller*, 156 F.3d at 603, and it expressly repudiated its prior definition of malice as lacking "just cause or excuse," *see id.* at 605. Rather, the Fifth Circuit held that an injury is "malicious" within the meaning of § 523(a)(6) only if the act in question was "'done with the actual intent to cause injury.'" *Id.* at 606 (quoting *Geiger*, 523 U.S. at 61); *see also Williams* v. *Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 509 (5th Cir. 2003) ("A debtor acts with implied malice when he acts 'with the actual intent to cause injury.'" (quoting *Miller*, 156 F.3d at 606)).[5] Because a

[5] Under *Miller*, "actual intent" can be inferred where there is either "an objective substantial certainty of harm or a subjective motive to cause harm." *Miller*, 156 F.3d at 606. That is, while *Geiger* holds that the "willful and malicious" standard requires actual intent to cause injury—not mere negligence or recklessness—*Miller* construes that requirement to be satisfied not only where the debtor subjectively intended injury, but also where the "objective certainty" of injury is so patent that the act can be deemed intentional as a matter of law.

speaker who believes his statement to be true cannot intend to cause legal injury, under the Fifth Circuit's reasoning Jett's claim against Sicroff would be dischargeable in Sicroff's bankruptcy.

The Ninth Circuit here expressly acknowledged the conflict of authority and rejected the Fifth Circuit's approach. The panel observed that "at least one other circuit has read *Geiger* to eliminate" the pre-*Geiger* "just cause and excuse" definition of malice, but concluded that "we disagree with that interpretation, which . . . conflates the elements of willfulness and malice in contravention of our clear precedents." App. 10a n.4. Review by this Court is necessary to resolve that square and acknowledged disagreement among the courts of appeals.

B. The decision below also conflicts with the decisions of the Court of Appeals for the Sixth Circuit in *Wheeler* and *Kennedy*, which provide that in order for a claim for libel to be a debt for "willful and malicious injury" the debtor must have been aware that the statements in question were false when he made them. *See Wheeler*, 783 F.2d at 615; *Kennedy*, 249 F.3d at 581, 582–583.

In *Wheeler*, the debtor, Laudani, was found liable in Michigan state court for publishing and distributing a libelous document accusing James and Sheila Wheeler of public corruption. *See Wheeler*, 783 F.2d at 611. On appeal from a finding that the verdict necessarily encompassed a determination that "Laudani acted willfully and maliciously," the

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The Fifth Circuit's decision in *Caton* v. *Trudeau* (*In re Caton*), 157 F.3d 1026 (5th Cir. 1998), reflects this principle. There, the court held that an Illinois default judgment—under which the debtor was deemed to have admitted that he made libelous statements "maliciously and intentionally with full knowledge of their falsity or in complete and reckless disregard of their truth or falsity, for the purpose of injuring and destroying [the plaintiff's] personal and professional reputation"—necessarily determined that "there was a deliberate or intentional injury, precluding discharge under § 523(a)(6), as [the debtor's] libelous statements were objectively substantially certain to result in the injury to [the plaintiff]." *Id.* at 1029, 1030 (citation and internal quotation marks omitted). *Caton* thus exemplifies the situation in which the certainty of injury from a wrongful act is so patent as to warrant deeming the injury "deliberate and intentional."

Sixth Circuit reversed. *Id.* The Sixth Circuit reasoned that the state court libel judgment could have been premised on a mere finding that Laudani's statements were made with reckless disregard as to whether the statements were false, and did not require a finding that Laudani knew the statements were false. *See id.* at 615. But "[m]ere reckless disregard for the truth or falsity of the statement, which can support a libel verdict, is not a willful and malicious injury for purposes of § 523(a)(6)." *Id.* Because the state court had made no determination that Laudani knew his statements to be false, the Sixth Circuit concluded that the debt was not for "willful and malicious injury" and was dischargeable. *See id.*

The Sixth Circuit's subsequent decision in *Kennedy*, also a defamation case, reaffirmed that principle, holding in light of *Geiger* that "only acts done with the intent to cause injury—and not merely acts done intentionally—rise to the level of willful and malicious injury for purposes of satisfying § 523(a)(6)." *Kennedy*, 249 F.3d at 581.[6] Although the *Kennedy* panel found the defamatory statements at issue in that case nondischargeable, it expressly relied on the fact that the debtors "continued to make the statements in question even after receiving clear proof that the statements were false; . . . thus, it is clear that in making the statements, the

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[6] *Kennedy* noted that *Geiger* had superseded aspects of the *Wheeler* decision that are not at issue here. *See Kennedy*, 249 F.3d at 580. Prior to this Court's decision in *Geiger*, the Sixth Circuit was among the courts of appeals that had held that the "willful and malicious injury" standard required only an intentional act that caused injury, and did not require an intentional injury. *See Perkins* v. *Scharffe*, 817 F.2d 392, 394 (6th Cir. 1987). *Geiger* expressly overruled that line of authority. *See Geiger*, 523 U.S. at 60 (noting that its holding was inconsistent with *Perkins*). In *Kennedy*, the Sixth Circuit noted that *Wheeler*, insofar as it recited the prior, more lenient standard for determining nondischargeability, was superseded by *Geiger*. *See Kennedy*, 249 F.3d at 580. But *Kennedy* only strengthened and reaffirmed *Wheeler*'s ultimate holding that a libelous statement could not constitute "willful and malicious injury" if the debtor believed the statement to be true when made.

[debtors] intended injury." *Id.* (quoting district court opinion).[7]

The Ninth Circuit decision below cannot be squared with this reasoning. Here, the bankruptcy court made an express finding of fact—never reversed on appeal—that Sicroff "believed [his] statements were true." App. 27a. Despite that finding, the Ninth Circuit held that Sicroff's statements were both "willful" and "malicious," and were thus nondischargeable. App. 11a.[8]

* * *

Both the Fifth Circuit's reasoning in *Miller* and the Sixth Circuit's reasoning in *Wheeler* and *Kennedy* reflect the same basic principle: that a debtor acting under an "honest,

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[7] Other lower courts—both before and after *Geiger*—have also held that one who publishes a false statement without knowledge of its falsity cannot have committed a willful and malicious injury. *See, e.g., M & I Heat Transfer Prods., Ltd.* v. *Gorchev* (*In re Gorchev*), 275 B.R. 154, 167 (Bankr. D. Mass. 2002) (holding that state court judgment for libel did not establish that the debt was nondischargeable under § 523(a)(6) because "[n]egligence in ascertaining truth or falsity is all that was required [to support the libel verdict], and that is not enough to make the resulting injury malicious"); *Pagones* v. *Mason* (*In re Mason*), 1999 WL 58579, at *3 (Bankr. S.D.N.Y. Jan. 28, 1999) ("The intentional tort of defamation may constitute 'willful and malicious injury' . . . as long as the debtor knew the published statements were false." (citing *Wheeler*)); *Thompson* v. *Durrance* (*In re Durrance*), 84 B.R. 238, 239 (Bankr. M.D. Fla. 1988) ("[D]efamation may constitute 'willful and malicious injury . . .' as long as the Debtor knew the published statements were false." (citing *Wheeler*)); *Materia* v. *Pereira* (*In re Pereira*), 44 B.R. 248, 251 (Bankr. D. Mass. 1984) ("Malice in the bankruptcy sense means that the author knew the statements made were false. . . . Reckless disregard for the truth or falsity of a statement does not meet the standard of willful and malicious injury.").

[8] Over twenty-five years earlier—in a decision interpreting the predecessor to the Bankruptcy Code, the Bankruptcy Act of 1898—a panel of the Ninth Circuit had stated that, for purposes of determining the dischargeability of a claim of libel, "[w]hen injury is caused by false statements, . . . 'willfulness' denotes that the speaker knew his statements were false." *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio S.p.A.* v. *Kasler* (*In re Kasler*), 611 F.2d 308, 310-311 (9th Cir. 1979). The decision below can only be understood as having repudiated this aspect of *Kasler*'s analysis. In doing so, it conflicts with the decision of the Fifth Circuit in *Miller* and those of the Sixth Circuit in *Wheeler* and *Kennedy*.

but mistaken belief" "cannot be said to have intentionally caused injury," and that the resulting debt thus cannot be for "willful and malicious injury." *Miller*, 156 F.3d at 606 (citation and internal quotation marks omitted). By holding Sicroff's debt nondischargeable despite the undisturbed factual finding that he was under an "honest, but mistaken belief" as to the truth of his statements, the Ninth Circuit rejected that principle and clearly broke with both the Fifth and Sixth Circuits' reasoning. There is no doubt that under the law of those circuits, Sicroff's debt for libel would have been discharged in his bankruptcy. This division of authority is clear, square, and acknowledged. It cannot be resolved absent this Court's intervention.

II. THE DECISION BELOW CONFLICTS WITH AND UNDERMINES THIS COURT'S DECISION IN *KAWAAUHAU* V. *GEIGER*

The Ninth Circuit's decision also conflicts with the clear import of this Court's decision in *Kawauuhau* v. *Geiger*, and undermines the rule articulated in that decision.

In *Geiger*, this Court addressed the question whether a debt is nondischargeable when it arises out of an act that was done intentionally and caused injury, or only when it arises out of an act done with the actual intent to cause injury. *Geiger*, 523 U.S. at 61. This Court adopted the latter construction, holding that the statute contemplates "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* (emphasis in original). For this reason, the Court explained, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)," even where the acts that gave rise to those injuries were intentional ones. *Id.* at 64.

But that is all that the record here reflects. As the Ninth Circuit observed, California law defines libel simply as "a false and unprivileged publication by writing [or other means], which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." App. 6a (quoting Cal. Civ. Code § 45). Under California law, a libel verdict in a case involving a private-figure

plaintiff requires no more than a showing that the speaker was negligent as to the truth or falsity of his statements. *See Brown* v. *Kelly Broad. Co.*, 771 P.2d 406, 425 (Cal. 1989).[9]

Here, the bankruptcy court expressly found that Sicroff believed his statements were true, and that finding was undisturbed on appeal. Nor did any of the courts below ever intimate that Sicroff's belief in the truth of his statements was more than negligent—or even suggest that the record could support such a finding.

The Ninth Circuit panel below found that the libelous statements were "willful" based only on Sicroff's concession that the act of publication was an intentional one. App. 8a. As the district court had explained, the record before the bankruptcy court showed nothing more than "willful *publication*"; Jett "did not even attempt" to disprove Sicroff's "belief in [the] truthfulness" of his statements and thus show willful *injury*. App. 20a–21a (emphasis added).

The panel then went on to apply its pre-*Geiger* case law on the meaning of "malicious," focusing—as if *Geiger* had never been decided—on whether the *act* was intentional and wrongful, not on whether the debtor intended to cause legally cognizable *injury*. App. 8a–10a. The panel's reasoning displays a fundamental misunderstanding of the scope and import of *Geiger*, which should have been understood to overrule prior case law—like that relied on by the Ninth Circuit here—that failed to comport with *Geiger*'s focus on the debtor's intent to cause injury. And the resulting decision, which holds a debt for a negligently made libelous statement nondischargeable in bankruptcy, simply cannot be squared with *Geiger*'s holding that negligently—or even recklessly—inflicted injuries are not "willful and malicious" within the meaning of § 523(a)(6).

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[9] While the statute by its terms would impose strict liability for libel, in view of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the California Supreme Court has construed the statute to require private-figure plaintiffs to show that the defendant was at least negligent as to truth or falsity. *Brown*, 771 P.2d at 425.

* * *

This case presents an excellent opportunity for this Court not only to correct the manifest error committed by the Ninth Circuit below, but also, more broadly, to resolve the abiding confusion among the lower courts regarding the meaning and scope of *Geiger*. The issue is of national importance: the question of how to construe the "willful and malicious" exception to discharge arises regularly in bankruptcy courts around the country. And the expansive construction accorded to that provision by the Ninth Circuit will have the effect of denying many debtors who never intended to commit a legal wrong the fresh start promised by the bankruptcy laws.

Moreover, the Ninth Circuit's reasoning will have a particularly troublesome effect in libel cases. Although states are constitutionally permitted to impose liability for libel in cases where the plaintiff is a private figure based on a mere showing of negligence, *see Gertz*, 418 U.S. at 347, that rule necessarily has a chilling effect on speech and debate.[10] Aggravating the punishment for statements that are merely negligent by denying such an honest, but mistaken debtor the benefit of the discharge only exacerbates that damage to First Amendment values.

This Court should accordingly grant review of the decision below to resolve the confusion among the courts of appeals on this important issue and to clarify that *Geiger*—which expressly held that neither negligence nor recklessness amounted to a "willful and malicious" injury—precludes holding debts from negligently made libelous statements to be nondischargeable in bankruptcy.

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[10] It is for that reason that this Court has held that presumed or punitive damages may not be awarded in cases of libel involving matters of public concern based only on a showing of negligence as to the truth or falsity of the matter asserted. *See Gertz*, 418 U.S. at 349-350.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2005

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: SETH E. SICROFF,
Debtor,

STEPHEN C. JETT,
Plaintiff-Appellant,

v.

SETH E. SICROFF,
Defendant-Appellee,

and

OFFICE OF THE UNITED STATES TRUSTEE,
Trustee.

No. 03-15610
D.C. No. CV-02-00975-LKK

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Argued and Submitted
May 12, 2004—San Francisco, California

Submission Withdrawn May 27, 2004
Resubmitted February 9, 2005

Filed March 23, 2005

Before: Diarmuid F. O'Scannlain, Eugene E. Siler,* and Michael Daly Hawkins, Circuit Judges.

[*3526] Opinion by Judge O'Scannlain

[*3528] . . .

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a debt was nondischargeable under the Bankruptcy Act as one for willful and malicious injury when it arose out of a published defamatory letter from a graduate student to the Chancellor of the University of California at Davis.

I

Stephen C. Jett and Seth E. Sicroff were, respectively, a tenured professor and a graduate student in the Geography **[*3529]** Department of the University of California at Davis. When the university proposed closing the department, Sicroff sent a letter, dated April 17, 1993, to the Chancellor and Deans of the university, with copies to the California Aggie, Sacramento Bee and Davis Enterprise newspapers, in which he purported to reveal the "real motivation" for closing the department. Sicroff's letter stated, in part, that:

> Despite the substantial improvements that may be credited to Prof. Ives [and his new hires], the old guard of the geography department has plagued you with a continuous barrage of specious complaints about Prof. Ives. In particular, Prof. Stephen Jett and Prof. Conrad Bahre have been relentless in their accusations against the new chairperson, even while they themselves have been the

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* The Honorable Eugene E. Siler, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

> subject of numerous and well-substantiated charges of unprofessional conduct.
>
> Too weak to fire or even discipline tenured faculty, no matter how serious their misbehavior, you have taken this opportunity to rid yourself of a burr under your saddle. Shame on you, and shame on us all if we put up with it!

Based largely on the accusations against them contained in this letter, Professors Jett and Bahre filed two suits, which were later consolidated, against Sicroff and several other defendants alleging, among other injuries, slander, libel and intentional infliction of emotional distress. Before trial, the other defendants settled their claims with Jett and Bahre. Sicroff, however, refused to participate in the settlement and threatened to sue Jett and Bahre with malicious prosecution if they dismissed their claims against him.[1]

[*3530] After the partial settlement, the Sacramento County Superior Court referred the remaining claims to binding arbitration before retired Sacramento Superior Court Judge Benjamin A. Diaz, who found that Sicroff had made defamatory statements against Jett and Bahre. On April 23, 1996, the court entered awards for Bahre of $34,500 (including $4,500 of punitive damages) and for Jett of $23,000 (including $3,000 of punitive damages). Sicroff appealed this finding and the awards to the Third District Court of Appeal, which reversed the judgment against him, ruling that the trial court had improperly denied him his right to a jury trial by ordering the matter to binding arbitration over his objection. On remand, the trial court refused to confirm the arbitration-based judgment and its decision was upheld on a second appeal, which the appellate court determined to be frivolous.

While this litigation was ongoing, Sicroff filed for bankruptcy. Jett and Bahre timely filed adversary complaints to

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[1] Despite this threat, Bahre has since dismissed his claim against Sicroff, leaving only Jett's claims against Sicroff to be resolved.

determine dischargeability based upon their then-existing judgments against Sicroff and the bankruptcy court lifted its automatic stay to allow the completion of the state court litigation between the parties. Following a second remand to the state trial court, a settlement conference was conducted, at which Sicroff failed to appear.[2] After the collapse of the settlement conference, the state court trial proceedings were stayed pending resolution of the bankruptcy proceeding that gives rise to this appeal.

On February 28, 2002, the bankruptcy court held a hearing limited to the issue of the dischargeability of Sicroff's debt[3] **[*3531]** to Jett. At the hearing, Sicroff conceded that his conduct was "willful and intentional" but denied that it was "malicious."

In a memorandum order, the bankruptcy court found Sicroff's debt to be dischargeable. In pertinent part, it reasoned that:

> First of all, it is clear from . . . the April 17, 1993 letter, that the primary purpose of Debtor's actions was to protest the closing of the Geography Department at the University of Davis. While there can be no doubt that Debtor intentionally and re-

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[2] At an early point in the course of this litigation—although exactly when is not clear from the record—Sicroff appears to have moved to Nepal, from whence he is unwilling to travel for the purpose of actively participating in his defense.

[3] Although there is not yet a state court judgment against Sicroff arising out of the alleged defamation, we have recognized that the filing of a claim, without reducing it to a judgment, is sufficient to establish a debt for the purpose of a dischargeability determination. *Banks v. Gill Distrib. Ctrs., Inc.* (*In re Banks*), 263 F.3d 862, 868 (9th Cir. 2001) ("The Bankruptcy Code defines the term 'debt' to mean 'liability on a claim,' and 'claim' is defined as a 'right to payment, whether or not such right is reduced to judgment . . . .'") (internal citations omitted); *see also American Law Ctr. PC v. Stanley* (*In re Jastrem*), 253 F.3d 438, 442 (9th Cir. 2001) ("[T]he definition of 'claim' in bankruptcy is exceedingly broad. A 'claim' is a 'right to payment, whether or not such right is reduced to judgment . . . .'").

> peatedly published his untrue statements about Plaintiff, the evidence tends to show that he believed those statements were true and, in his opinion, explained the real cause for the proposal to close the Geography Department.
>
> . . . .
>
> Secondly, objecting to the closing of the Geography Department and pointing out the perceived misconduct of University officials may be the "just cause and excuse" that would exonerate Debtor's actions. . . . Debtor did not make his statements to spite the Plaintiff, but to support the larger cause, at least in his mind, of unmasking the real reasons the University officials intended to eliminate the Geog- **[*3532]** raphy Department. In that sense, at least, Debtor's actions were not malicious.

Jett filed a timely notice of appeal to the District Court, which affirmed. Jett timely appeals to this court.

II

"[A] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). It is only the "honest but unfortunate" debtor, however, who is entitled to an entirely unencumbered fresh start. *Id.* at 287. Accordingly, the Bankruptcy Code exempts certain debts from discharge. Such exceptions to discharge "should be confined to those plainly expressed," *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)), and should "be strictly construed in order to serve the Bankruptcy Act's purpose of giving debtors a fresh start." *Industrie Aeronautiche v. Kasler (Matter of Kasler)*, 611 F.2d 308, 310 (9th Cir. 1979).

[1] Section 523(a)(6) of the Bankruptcy Code provides one such express limitation: "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Jett alleges that Sicroff's defamatory statements constituted a "willful and malicious injury" and that, therefore, the debt to which they give rise should not be discharged.

We turn first to the question of whether any of Sicroff's statements were defamatory and then to the question of [*3533] whether the injury that they caused was "willful and malicious."

A

The injury alleged in this case is Sicroff's defamation of Jett. The bankruptcy court found simply that Sicroff had published untrue statements about Jett. On appeal, the district court noted that the bankruptcy court had failed to distinguish adequately between false assertions of provable fact and statements of opinion and conducted a more thorough review of many of the allegedly defamatory statements. The district court concluded that many of the statements fell outside the realm of potentially defamatory statements but, because it found that Jett was unable to carry his burden of proving that the defamation both willfully injured him and was malicious, the court did not scrutinize the remaining statements and assumed *arguendo* that they were defamatory. We must, therefore, conduct that more probing review ourselves.

[2] In California, libel is defined by statute simply as "a false and unprivileged publication by writing [or other means], which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45.

We agree with the district court that certain statements were either simple name-calling or not provable factually.

See Flowers v. Carville, 310 F.3d 1118, 1127 (9th Cir. 2002) ("The law provides no redress for harsh name-calling."). However, this leaves at least some statements that were not evaluated by either the bankruptcy court or the district court for their libelous nature. These statements include Sicroff's allegations, contained in his April 17, 1993 letter, that Professors Jett and Bahre had been "the subject of numerous . . . charges of unprofessional conduct," should have been disciplined for "serious misbehavior," and had brought a "continu- **[*3534]** ous barrage of specious complaints" against the department chair.

Under California law, "it is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact." *Kahn v. Bower*, 284 Cal. Rptr. 244, 250 (Cal. Ct. App. 1991). The California courts have explained:

> [I]n ascertaining whether the statement in question is sufficiently communicative of provable falsity or actual fact to subject the defendant to liability, courts will continue to consider the totality of the circumstances .... First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense .... Next, the context in which the statement was made must be considered .... This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.

Id. at 249 (internal quotations and citations omitted).

[3] The bankruptcy court determined that statements in the April 17, 1993 letter regarding "numerous and well-substantiated charges of professional misconduct" were false and Sicroff's counsel did not disagree. The record also shows that Jett had not been disciplined for "serious misbehavior" and that he had not brought a "continuous barrage of specious complaints" against the department chair. Sicroff of-

fered no defense of "privilege" for his statements. Finally, by alleging "professional misconduct," "serious misbehavior" and other unprofessional activity, Sicroff's statements had a tendency to injure Jett in his occupation. For these reasons, we must conclude that Sicroff's statements satisfied the requirements of libel under California law.

[*3535] B

[4] We analyze the willful and malicious prongs of the dischargeability test separately. *See Carillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir. 2002) (noting with approval that "in *In re Jercich*, we treated the 'malicious' injury requirement of § 523(a)(6) as separate from the 'willful' requirement"); *see also Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1207-09 (9th Cir. 2001). Under the test, a creditor must demonstrate nondischargeability by a preponderance of the evidence. *Grogan*, 498 U.S. at 291. When applying this standard, "[i]n addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *In re Su*, 290 F.3d at 1146 n.6.

1

[5] The bankruptcy court concluded that the facts fell short of proving that Sicroff's acts were either willful or malicious. However, because Sicroff explicitly conceded that his behavior was "willful and intentional" for purposes of the dischargeability hearing, there is no reason to dwell on the "willful" prong. Sicroff offered no evidence that could counterbalance the weight of his concession and the bankruptcy court's contrary determination was clearly erroneous.

2

[6] An injury is "malicious," as that term is used in Section 523(a)(6), when it is: "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *In re Jercich*, 238 F.3d at 1209. Within the plain meaning of this definition, it is the

wrongful act that must be committed intentionally rather than the injury itself. *See Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part definition does *not* [*3536] require a showing of .... an intent to injure, but rather it requires only an intentional act which causes injury.").

[7] Because we are persuaded that at least some of Sicroff's statements were libelous, we also conclude that the first two criteria of "malicious injury" are met. A libelous act, by its nature, is self-evidently wrongful and is committed by an intentional act of publication—in this case, by Sicroff's dissemination of his letter. The third criterion—that the action necessarily cause injury—is also met because Sicroff's statements were directed at Jett's professional reputation and, therefore, will necessarily harm him in his occupation. Having satisfied the first three elements of "malicious injury," to prevail, Jett must demonstrate by a preponderance of the evidence that Sicroff published his statements "without just cause and excuse." It was this final criterion that the bankruptcy court found lacking.

a

The "just cause and excuse" element of "malicious injury" presents a mixed question of law and fact, which we review de novo. *Id.* at 791-92.

[8] The bankruptcy court found that Sicroff had "just cause and excuse" to defame plaintiff despite acknowledging that it could find "no cases ... that defined that phrase." We have, however, interpreted that phrase in at least one prior case. In *In re Bammer*, an en banc panel of this court reversed a Bankruptcy Appellate Panel decision that intentional fraud could be undertaken with "just cause and excuse" when the debtor acted "out of compassion for his mother" and no benefit inured to himself. *Id.* at 791. Explaining our reversal, we declared that "[w]e can think of no reason consistent with section 523 ... to permit a standardless, unmeasurable, emotional, and nonlegal concept such as

compassion to negate an identifiably and *legally* wrongful act." *Id.* at 793 (emphasis in original).

[*3537] [9] In the case before us, we similarly must conclude that Sicroff's goal of protesting the Geography Department's closure did not provide just cause or excuse to calumniate Jett's professional reputation.[4] Not only were his libelous statements legally wrongful, but Sicroff went well beyond the scope of his legitimate goal to attack Jett by name. When the California Aggie first printed his letter on April 22, 1993, it prudently excised the personalized attacks against Jett and Bahre. In response to this edit, Sicroff sent a second letter, which the newspaper reprinted on April 26, 1993, complaining that "[t]he edited version of my letter that you printed April 22 about the geography department . . . did not at all represent the main point of the letter" and inviting "readers [who] would like the full text of the letter [to] please drop me a note at the geography department." This action demonstrates a specific intent to injure Jett over and above otherwise legitimate protest. For these reasons, the bankruptcy court erred in its interpretation of the phrase "just cause and excuse" and in its conclusion that Sicroff's defamation was not malicious by virtue of its connection to a larger, legitimate purpose. We hold instead that Sicroff's libelous statements were not made with just cause and excuse and that, as a result, they were malicious.

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[4] In doing so, however, we affirm that the "just cause and excuse" element has survived *Geiger* in the Ninth Circuit. *See In re Jercich*, 238 F.3d at 1209. While at least one other circuit has read *Geiger* to eliminate the element, *see Miller v. J.D. Abrams Inc. (Matter of Miller)*, 156 F.3d 598, 606 (5th Cir. 1998), we disagree with that interpretation, which was based on reasoning that conflates the elements of willfulness and malice in contravention of our clear precedents. Although it may be rare to find a just cause and excuse for defamation, the phrase is hardly without use in other contexts. An assault, for example, may cause a "willful injury" and meet the first three criteria of "malicious," yet be justly excused by self-defense. However, while excuses that are otherwise valid defenses to criminal offenses may well function with similar force under the "malicious" prong of the dischargeability test, such an excuse is not offered here.

[*3538] III

[10] Because we must conclude that Sicroff's libelous statements constituted a willful and malicious injury, his debt to Jett is not dischargeable. The judgment of the district court is

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In re:

SETH E. SICROFF,
Debtor/Appellee,

v.

STEPHEN C. JETT,
Appellant.

NO. CIV. S-02-975 LKK
Bankr. No. 96-35758-C-7
Adv. Proc. No. 97-2277-C
[STAMP: FILED Mar. 5, 2003]

ORDER

Creditor Stephen C. Jett appeals the bankruptcy court's determination that Seth Sicroff's debt was not non-dischargeable under 11 U.S.C. § 523(a)(6). The debt at issue is Sicroff's liability arising out of Jett's state court action for defamation and intentional infliction of emotional distress. Jett, a former professor of geography at U.C. Davis, brought these claims against Sicroff for statements Sicroff published while a U.C. Davis graduate student that were critical of Jett.

[2] I decide the matter on the pleadings and the papers on file therein and after oral argument.

I.
STANDARDS

This court has jurisdiction to hear appeals from the bankruptcy court by virtue of 28 U.S.C. § 158. Such appeals are taken "in the same manner as appeals in civil proceed-

ings generally are taken to the courts of appeals from the district courts ...." 28 U.S.C. § 158(c)(2). Thus, upon review of a bankruptcy court's judgment, order, or decree, the district court should review conclusions of law *de novo*, and findings of fact for clear error. *See Am. Law Ctr. v. Stanley (In re Jastrem)*, 253 F.3d 438, 441 (9th Cir. 2001).

If the bankruptcy court's decision was correct, but was based on the wrong grounds, it should be affirmed "on any ground finding support in the record." *Grzybowski v. Aquaslide 'N Dive Corp. (In re Aquaslide 'N Dive Corp.)*, 85 B.R. 545, 549 n.4 (9th Cir. BAP 1987). The bankruptcy court should not be reversed for harmless error. *See Miller v. Shuman (In re Shuman)*, 81 B.R. 583, 587 (9th Cir. BAP 1987).

The central issue in this appeal is the propriety of the bankruptcy court's determination that Sicroff's conduct was not willfull and malicious within the meaning of the Act. That resolution was one of fact, to be reviewed for clear error. *See Banks v. Gill Distribution Centers, Inc., et al. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001). "A finding is 'clearly [3] erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

II.
ANALYSIS

A. RIPENESS

As an initial matter, I note that, as yet, there is no state court judgment against Sicroff. Nonetheless, the question of dischargeability is ripe. It is established that "the filing of [the underlying] action, without reducing it to judgment, was sufficient to establish a debt" for the purpose of a dischargeability action. *In re Banks*, 263 F.3d 862, 868 (9th Cir. 2001). The Circuit there explained that "[t]he Bankruptcy Code defines the term 'debt' to mean 'liability on a claim,' 11 U.S.C. § 101(12), and 'claim' is defined as a 'right to payment,

whether or not such right is reduced to judgment....' 11 U.S.C. § 101(5)." *Id.* Thus, this matter was properly before the bankruptcy court.

B. DETERMINATION OF DISCHARGEABILITY OF LIABILITY FOR DEFAMATION

Appellant Jett contends that Sicroff willfully and maliciously defamed Jett, such that Sicroff's liability should not be dischargeable in bankruptcy. To determine the question of dischargeability, the bankruptcy court had to first consider whether the statements at issue were defamatory at all, and if **[4]** so, whether they were made willfully and maliciously. I consider these questions in turn.

1. *Defamation*

Although the bankruptcy court found that many of the statements were defamatory, whether or not a statement is defamatory is a legal question that this court reviews *de novo*. Thus, I consider whether, under California law, the conduct that was allegedly willful and malicious constituted defamation at all. *See Bino v. Baily (In re Baily)*, 197 F.3d 997, 1000 (9th Cir. 1999) (bankruptcy court looks to state law to determine if conduct constitutes a state law based tort).[1]

Defamation may be either slander or libel. *See* Cal. Civ. Code § 44. Libel is a "false and unprivileged publication by writing ... which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal Civ. Code § 45. Slander is, in pertinent part:

> [A] false and unprivileged publication, orally uttered ... which:
>
> ....

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[1] At oral argument, there was a suggestion that the parties had stipulated that the statements were defamatory. Of course, the parties' stipulation cannot bind this court to an incorrect conclusion of law. *See United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987).

> (3) Tends directly to injure him in respect to his ... profession ... either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his ... profession ... **[5]** that has a natural tendency to lessen its profits ....

Cal. Civ. Code § 46. It is uncontested that the statements at issue in this matter were published. Less clear is whether all of them were defamatory.

First, appellant contends that Sicroff defamed him by stating or implying that appellant was "deadwood," had made "specious complaints," "serious[ly] misbehav[ed]," and was the subject of "well-substantiated charges of unprofessional conduct."[2] *See* April 17, 1993 Letter, Appellant's Excerpts of Record ("AER") Tab 3 at 72. Appellant also contends that Sicroff defamed him by making statements linking the disestablishment of the geography department to "four years of bombardment of complaints" by Jett and another professor, Conrad **[6]** Bahre. *See, e.g.*, September 8, 1994 Letter, AER Tab 3 at 79. Further, appellant argues that Sicroff defamed him by stating that Jett was "unable, despite energetic efforts, to find another department willing

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[2] The letter containing these statements read, in pertinent part:

> You [the chancellor] promised your full support, including six new appointments that would not only turn the department into a world-class center for mountain studies, but also neutralize the resistance of the dead wood that you couldn't dismiss. You reneged on this promise.... [T]he old guard of the geography department has plagued you with a continuous barrage of specious complaints about Prof. Ives. In particular, Professor Stephen Jett and Prof. Conrad Bahre have been relentless in their accusations against the new chairperson, even while they themselves have been the subject of numerous and well-substantiated charges of unprofessional conduct.
>
> Too weak to fire, or even discipline tenured faculty, no matter how serious their misbehavior, you have taken this opportunity to rid yourself of a burr under your saddle.

to accept" him, and by stating, in the same letter in which he discussed Jett's settlement with the university, that "the university is an easy mark for legal extortion." *See id.* at 79-80. Finally, appellant contends that Sicroff's statement to his office-mate, a former graduate student at U.C. Davis, that Jett might be a homosexual, had beady eyes, and "looked like he could have murdered people," were defamatory. *See* Stuhr Depo., Tab 3 at 160:20-161:21.

Reviewing *de novo* the legal question of whether or not these statements are defamatory, I note that bankruptcy court failed to consider the distinction between assertions of fact and those of opinion, which do not constitute defamation. *See Kahn v. Bower*, 232 Cal.App.3d 1599, 1607 (1991) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)) (Statements not implying "a provably false factual assertion," do not constitute defamation). Whether a statement is a provably false factual assertion depends on the totality of the circumstances, including the context in which the statement was made and the understanding of the statement's audience. *See id.* In particular:

> where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or [7] hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 601 (1976).[3]

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[3] The Ninth Circuit has concluded that since *Milkovich* rejected a categorical rule that opinions are exempted from defamation law even when they imply facts, the above-quoted language from *Gregory* "can no longer be interpreted to mean that *all* statements made in such settings are automatically exempt from defamation liability." *Rodriguez v. Panayiotou*, 314 F.3d 979, 987 (9th Cir. 2002). Rather, the Circuit cautioned, the court must still look to the context to determine whether a reasonable

Here, the observation that Jett had beady eyes and looked like he could have murdered people is clearly not an assertion that Jett was a murderer, but only an observation about his bearing or appearance. Likewise, the suggestion that Jett was "deadwood" in the geography department is not a provable factual statement, but simply name-calling. *See, e.g., Gregory*, 17 Cal.3d at 601. As for the assertion that Jett was the subject of well-substantiated charges, it was uncontested that Jett was the subject of at least a charge of sexual harassment. *See* Himelfarb Depo., AER Tab 3 at 334:7-16. While the chancellor testified that there were no well-substantiated charges, *id.* at 334:7-18, the quality of substantiation is a matter of opinion, and not a fact that can be proved or disproved. Finally, the implication that Jett's settlement with the university was "legal extortion" was not defamatory. Sicroff did not suggest that the settlement was actual extortion, which would have been untrue, but simply used "legal extortion" as a figure of speech **[8]** to reflect his negative opinion of the settlement. Thus, much of the substance of the complaint is simply not actionable.

Assuming, *arguendo*, that at least some of the statements made by Sicroff were potentially actionable and not constitutionally protected, debt arising from Sicroff's liability would be dischargeable in bankruptcy unless the defamatory statements were made willfully and maliciously. I turn to that issue.

2. *Willfulness and Malice*

Section 523(a)(6) of the Bankruptcy Code provides that a debt "for willful and malicious injury by the debtor to another" is not dischargeable in bankruptcy. A creditor that seeks a determination of nondischargeability on this basis has the burden of proving both willfulness and malice by a preponderance of the evidence. *See Transamerica Com-*

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finder of fact could find the statements "imply a provably false factual assertion." *Id.*

mercial Finance Corp. v. Littleton (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991).

The Supreme Court has held that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523 (a)(6)." *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998). Based on *Geiger*, the Ninth Circuit has concluded (contrary to the conclusion of the *Baldwin* Bankruptcy Appeals Panel, upon which the appellant relies) that the willful injury requirement "articulates only a subjective dimension." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1145 (9th Cir. 2002). In *Su*, the Circuit held that "§ 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict **[9]** injury or when the debtor believes that injury is substantially certain to result from his own conduct."[4] *Id.* at 1145. Of course, the bankruptcy court need not "simply take the debtor's word for his state of mind. In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Id.* at 1146 n.6.

An injury is "malicious" when it is "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause and excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001). Where the willfulness prong has been established, "malice may be inferred from the nature of the wrongful act." *Littleton*, 942 F.2d at 554.

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[4] I note for purposes of clarity that in the dischargeability context, the "willful and malicious" inquiry is more stringent than the malice inquiry under the *New York Times* test. Under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a statement is made with actual malice if it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 726. Where dischargeability is concerned, however, even reckless disregard is not enough to show that the debtor was willful and malicious. *See Geiger, supra.*

In the matter at bar, the bankruptcy court found that, "[w]hile there can be no doubt that Debtor intentionally and repeatedly published his untrue statements about Plaintiff, the evidence tends to show that he believed those statements were true and, in his opinion, explained the real cause for the [10] proposal to close the Geography Department." Memorandum Decision at 3:9-14, AER Tab 13. Based on this finding, the bankruptcy court determined that appellee Sicroff did not willfully injure appellant Jett, because in defamation actions, "the willfulness prong of the test requires that 'the speaker knew his statements were false.'" *Id.* at 3:18-20 (footnote omitted) (citing *Industrie Aeronautiche v. Kalser (In re Kalser)*, 611 F.2d 308, 311-312 (9th Cir. 1979). The bankruptcy court also determined that malice was not established because the goal of explaining the causes behind the closure of the Geography Department might constitute "just cause and excuse."

As noted above, whether an actor behaved willfully and maliciously is a question of fact, to be reviewed for clear error. *See Banks v. Gill Distribution Centers, Inc., et al. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001). Appellant first challenges the bankruptcy court's willfulness determination, arguing that the evidence relied upon by the bankruptcy court was inadmissible hearsay. Specifically, in concluding that the evidence tended to show that appellee believed the truth of his assertions, the bankruptcy court cited a letter to a newspaper editor, in which appellee stated that he showed the California Aggie reporter documentary evidence of the truth of his allegations. *See* Memorandum Decision at 3 n. 2, AER Tab 13. While the statements in this letter might be barred as inadmissible hearsay, the bankruptcy court's reference to that statement would be harmless error at best. What appellant fails [11] to come to grips with is that, to satisfy his burden of proving willful injury, appellant had to show by a preponderance of the evidence that Sicroff knew his defamatory statements were false. *See Industrie Aeronautiche v. Kalser (In re Kalser)*, 611 F.2d 308, 310-11 (9th Cir. 1979) ("[w]hen injury is caused by false statements, as here, 'willfulness' denotes that the speaker knew his state-

ments were false"). Appellant did not even attempt to do so. Rather, appellant's position was that he simply had to show willful publication, *see* Jett Trial Brief, AER Tab 8 at 380:25-27, and that subjective belief in truthfulness was not relevant, *see id.* at 366:13-14, and that truth was relevant only as an affirmative defense to the substantive defamation claim. *Id.* at 374:3-4. Given this position, it is not surprising that, as I explain below, the record does not demonstrate that appellee believed or knew that his statements were false.

In all the evidence presented by appellant to the bankruptcy court, there is none, circumstantial or otherwise, that "tends to establish what the debtor must have actually known when taking the injury-producing action." *Su*, 290 F.3d at 1146 n.6. Appellant's evidence that Sicroff was glad his letters annoyed appellant, *see* Stuhr Depo., AER Tab 3 at 186:27-187:25, does not suggest that Sicroff did or did not believe his statements were true. A person who has a conflict with another will be just as happy to see what they believe is an unpleasant truth published about that person as an unpleasant falsehood. **[12]** Nor was the bankruptcy court wrong not to admit evidence concerning an alleged arbitration agreement between appellant and Sicroff in the state court action. As the bankruptcy court pointed out, appellant had failed to submit the evidence before trial. *See* Reporter's Transcript, AER Tab 10 at 415:18-24. Furthermore, even if, as appellant contends, his evidence showed that Sicroff perjured himself to convince California's Third District Court of Appeal to twice reject appellant's argument that the arbitration was binding, evidence of this would be relevant, at best, to show Sicroff was a liar. Federal Rule of Evidence 404, however, prohibits evidence of other wrongs "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Nor would such evidence, if admissible, be probative of whether or not Sicroff believed his defamatory statements true.

Of course, it may be that Sicroff knew very well that he was publishing lies. On the other hand, it may be, as appellant's counsel himself suggested, that Sicroff's statements

were "subjective, unsubstantiated, and paranoid surmise, speculation ...." Jett Trial Brief, AER Tab 8 at 379:21-22. Defamation, based on reckless disregard for the truth or falsity of the statements, however, does not satisfy the willfulness requirement. *See Kalser*, 611 F.2d at 311 (explaining that, because a libel judgment against the debtor could have been based on reckless disregard for the truth or falsity of the statements, the willfulness requirement was not met simply by [13] virtue of that judgment).

Appellant acknowledged a number of different subjective motivations that could be attributed to Sicroff's statements, stating:

> ... Sicroff's statements were either malicious lies originating with Sicroff, the result of incorrect and false information provided to him by others (undoubtedly Jack Ives, with whom plaintiffs and other faculty members of the department have had long-standing differences), unsubstantiated "rumors," or the product of Sicroff's own ravings motivated by his hatred of plaintiffs for what Sicroff (falsely) perceives as plaintiffs' personal responsibility for the disestablishment of the geography department.

Jett Trial Brief, AER Tab 8 at 377:21-378:1. Because there is nothing in the record to show that Sicroff more likely than not believed that his statements were false, appellant did not satisfy the preponderance standard, and the bankruptcy court's finding that there was no willful defamation was not clearly erroneous. Further, as appellant did not satisfy the willfulness requirement, any error the bankruptcy court might have made in also finding lack of malice is harmless.

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Appellant argues that the bankruptcy court erred in failing to address his emotional distress claim. Although the bankruptcy court did not specifically refer to the appellant's emotional distress claim, it appears that the dischargeability determination was meant to dispose of the emotional dis-

tress claim along with the defamation claim, as the decision read, "an order will be entered holding that *any* obligation of the Debtor **[14]** to Plaintiff for his false statements is dischargeable." Memorandum Decision, AER Tab 13 at 577:13-15 (emphasis added). Because, under California law, "[a]n emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action," *Leidholdt v. L.F.P. Inc.*, 860, F.2d 890, 893 n.4 (9th Cir. 1988), the bankruptcy court was correct to discharge liability on the emotional distress claim along with that for the defamation claim.[5]

III.
CONCLUSION

Based upon the foregoing, the determination of the bankruptcy court is hereby AFFIRMED.

IT IS SO ORDERED

DATED: March 4, 2003.

/s/

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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[5] Even if there were some basis for distinguishing the applicability of this state law principle in the context of bankruptcy dischargeability, this court would nonetheless uphold the dischargeability determination. Nothing in the record that was before the bankruptcy court showed that the alleged distress was caused knowingly, as required for a willfulness finding, rather than recklessly or negligently. Instead, appellant made the same mistake he made with his motion for dischargeability on the defamation claim, believing Sicroff's subjective state of mind was not pertinent. *See* Jett Trial Brief, AER Tab 8 at 371:4-5. In fact, appellant's counsel expressly acknowledged in his trial brief that Sicroff's subjective mental state remained in question, explaining, "The only question for the state-court jury is whether Sicroff intentionally inflicted emotional distress or did so carelessly or recklessly . . . ."

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
Sacramento Division

IN RE: SETH E. SICROFF,
Debtor,

CONRAD J. BAHRE AND STEPHEN C. JETT,
Plaintiffs,

vs.

SETH E. SICROFF,
Defendant.

Case No. 96-35758-C-07
Adversary No. 97-2277-C

Date Heard: Feb. 29, 2002
[STAMP: FILED Apr. 23, 2002
Entered on Docket Apr. 24, 2002]

* * * *

MEMORANDUM DECISION

This matter was heard upon Judge Klein's minute order of February 5, 2002 which provided, *inter alia*, that the trial would be limited to the issue of dischargeability, that the alternate direct testimony of Local Rule 9017-1 would be complied with, and that trial briefs were not required, but optional. Preliminarily, the court noted that Plaintiff Conrad J. Bahre had dismissed his complaint against Seth E. **[2]** Sicroff (hereinafter "Debtor") and was therefore not a party to the action. The court also partially granted the motion of Stephen C. Jett (hereinafter, "Plaintiff") to preclude the in-

troduction of any evidence at the hearing by Defendant. That order was made to enforce the provisions of Local Rule 9017-1 because Defendant had not filed and served any declarations or documentary evidence prior to the hearing as required by the Rule. The ruling did not exclude any pleadings filed prior to Judge Klein's minute order, nor any arguments, claims or assertions in opposition to Plaintiff's claim. It also did not relieve Plaintiff from the burden of proving his case.

The declarations of Plaintiff and Professor Richard Cowen were introduced and admitted into evidence without any cross-examination or objections. The court also considered Plaintiff's Exhibits 5-15,[1] inclusive, Exhibit 25, and the relevant portions of the depositions of Ryan D. Stuhr and Harvey Himelfarb.

The 9th Circuit standard for determining whether a particular act results in a "willful and malicious injury" as meant in 11 U.S.C. § 523(a)(6) has been defined as a two prong test; a willful act requiring a specific intent, and maliciousness as an intentional wrongful act necessarily causing injury done without just cause or excuse. *Carrillo v.* **[3]** *Su (In re Su)*, 259 B.R. 909 (9th Cir. BAP 2001), citing *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001). The facts of this case as provided by Plaintiff fall short of proving that the Debtor's acts were either willful or malicious.

First of all, it is clear from Exhibit 6, the April 17, 1993 letter, that the primary purpose of Debtor's actions was to protest the closing of the Geography Department at the University of Davis. While there can be no doubt that Debtor intentionally and repeatedly published his untrue statements about Plaintiff, the evidence tends to show that

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[1] Exhibits 1 through 4 were state court pleadings, Exhibits 16, 17, 26, 27, 28, and 29 only involved Professor Bahre, Exhibits 18 through 24, inclusive, were from the arbitration proceeding, and Exhibits 30 and 31 were the depositions of Ryan D. Stuhr and Professor Himmelfarb.

he believed those statements were true[2] and, in his opinion, explained the real cause for the proposal to close the Geography Department.

Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) defined a willful injury as more than a reckless or negligent act, it required a specific intent to injure. In the case of libel, the willfulness prong of the test requires that "the speaker knew his statements were false." *Industrie Aeronautiche v. Kasler (In re Kasler)*, 611 F.2d 308, 311-312, (9th Cir. 1979). Plaintiff has thus failed to establish that Debtor had the specific intent to injure Plaintiff by his statements.

Secondly, objecting to the closing of the Geography **[4]** Department and pointing out the perceived misconduct of University officials may be the "just cause and excuse" that would exonerate Debtor's actions. No cases were found that defined that phrase. In the absence of a definition, it is not unreasonable to look at the circumstances surrounding Debtor's actions to include the subjective reasons for his conduct. Debtor did not make his statements to spite the Plaintiff, but to support the larger cause, at least in his mind, of unmasking the real reasons the University officials intended to eliminate the Geography Department. In that sense, at least, Debtor's actions were not malicious.

For the reasons stated herein and on the record at the hearing of February 29, an order will be entered holding that any obligation of the Debtor to Plaintiff for his false statements is DISCHARGEABLE.

DATED: April 23, 2002.

/s/
DAVID E. RUSSELL
BANKRUPTCY JUDGE

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[2] *See* Exhibit 12, particularly the penultimate paragraph of the first page and the second paragraph of page 2 where Debtor states that he showed the California Aggie reporter documentary evidence of the truth of his allegations.

Supreme Court, U.S.
FILED
JUN 6 - 2005
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No. 04-1372

IN THE

Supreme Court of the United States

SETH E. SICROFF,

Petitioner,

v.

STEPHEN C. JETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Over a period of approximately three years, Petitioner Seth E. Sicroff repeatedly libeled Respondent Stephen C. Jett. At trial, Jett demonstrated that Sicroff made numerous libelous statements; that Sicroff knew that certain of his libelous statements were false when made; and that Sicroff willfully and maliciously injured Jett. Sicroff declined to attend the trial and his counsel offered no evidence to rebut Jett's demonstration. Moreover, the record is barren of any statement by Sicroff or any admissible evidence that Sicroff believed that his libelous statements were true when he made them.

Petitioner presents the following question:

Whether a debt for libel is nondischargeable under section 523(a)(6) of the Bankruptcy Code, which exempts from the discharge debts for "willful and malicious injury," when the debtor believed the libelous statement to be true when it was made.

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2. Certiorari review of the decision below is not warranted based upon the asserted conflict with the decisions of the Sixth Circuit in *Wheeler* and *Kennedy*. 20

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PRELIMINARY STATEMENT

Respondent Stephen C. Jett holds a claim for libel against Petitioner Seth E. Sicroff. In the decision below, the Ninth Circuit held that the bankruptcy court had erred in concluding that Jett's claim does not meet the requirements for nondischargeability under section 523(a)(6) of the Bankruptcy Code, 11 U.S.C. § 523(a)(6). Based upon its independent review of the record, the court of appeals determined correctly that the facts demonstrated that Sicroff had "willfully" and "maliciously" injured Jett.

On the question whether the injury to Jett was "willful," the record indicates that Sicroff conceded that Jett had established this statutory requirement. But even if Sicroff had not made this concession, the court of appeals concluded independently that the record demonstrates that Sicroff willfully injured Jett. Pet. App. 10a (describing one example of Sicroff's conduct and stating that "[t]his action demonstrates a specific intent to injure Jett").

On the question whether the injury to Jett was "malicious," the court of appeals concluded that Jett had satisfied this requirement because, among other things, Sicroff intentionally injured Jett "without just cause or excuse." Pet. App. 9a-10a. The court determined properly that, because Sicroff's injury to Jett was both "willful" and "malicious," Sicroff's libel debt was nondischargeable under section 523(a)(6).

The decision of the Ninth Circuit provides no occasion for certiorari review. Contrary to Sicroff's contentions, the decision below is fully consistent with the applicable precedents of this Court. Nor does the Ninth Circuit's decision conflict with the decisions of other courts of appeals in the manner represented by Sicroff. To the extent that some aspects of the Ninth Circuit's decision are inconsistent with aspects of the decisions of other courts of appeals, this case neither requires nor presents the

appropriate vehicle for the Court's intervention, as the result would be the same under the cases that Sicroff cites.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the district court, is reported at 401 F.3d 1101, and is reproduced at Pet. App. 1a-11a. The opinion of the United States District Court for the Eastern District of California, affirming the judgment of the bankruptcy court, is unreported, and is reproduced at Pet. App. 13a-23a. The opinion of the United States Bankruptcy Court for the Eastern District of California is unreported, and is reproduced at Pet. App. 25a-27a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 23, 2005. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This matter arises out of the chapter 7 bankruptcy case of Petitioner Seth E. Sicroff, a former graduate student at the University of California at Davis ("University"). Respondent, Stephen C. Jett, is a former professor at the University.

After Sicroff filed his bankruptcy case, Jett commenced an adversary proceeding in the bankruptcy court to determine the nondischargeability of Jett's claim against Sicroff for Sicroff's libelous statements made over a period of approximately three years. Prior to the commencement of trial, Jett timely filed and served his pretrial declarations and exhibits, as required by the applicable local rule. He also filed an extensive trial brief setting forth the relevant factual background, pertinent evidence, and law. Sicroff filed nothing and failed to object to Jett's trial evidence, as the local rule requires. As a result of Sicroff's failure to comply with the governing rule, the bankruptcy court granted

Jett's motion *in limine* precluding Sicroff from presenting any evidence at trial. Sicroff (who at the time was apparently living in Nepal) declined to attend the trial and his counsel offered no evidence to rebut Jett's presentation or establish a defense, including any defense that Sicroff believed that his libelous statements were true at the time they were made.[1]

In rendering its decision, the Ninth Circuit conducted an independent review of the record. The court did so, in part, because some of Sicroff's libelous statements "were not evaluated by either the bankruptcy court or the district court for their libelous nature," including Sicroff's allegations in his April 17, 1993 letter that Jett had been "'the subject of numerous . . . charges of unprofessional conduct,' should have been disciplined for 'serious misbehavior,' and had brought a 'continuous barrage of specious complaints' against the department chair." Pet. App. 7a.

In determining that Sicroff's statements constituted libel under California law, the Ninth Circuit expressly noted that "[t]he bankruptcy court determined that statements in the April 17, 1993 letter regarding 'numerous and well-substantiated charges of professional misconduct' were false and Sicroff's counsel did not disagree." Pet. App. 7a. "The record also shows," the Ninth Circuit continued, "that Jett had not been disciplined for 'serious misbehavior' and that he had not brought a 'continuous barrage of specious complaints' against the department chair," as Sicroff stated in the April 17, 1993 letter. *Id.* Thus, the Ninth Circuit found that the record established

[1] In fact, the record demonstrates, among other things, that Sicroff repeated certain of his libelous statements about Jett ***after*** he had been shown that they were false. For example, in August of 1995, Sicroff attended the deposition of Harvey Himelfarb, Acting Vice Provost of the University. *See* Appellant's Excerpts of Record ("AER") filed with the court of appeals, at 222. This deposition demonstrates that certain of Sicroff's libelous statements were untrue. Nevertheless, following the deposition, Sicroff continued to make them, including to a reporter for publication in May of 1996. AER 85-87; 343.

that these statements likewise were false. Pet. App. 7a-8a. The Ninth Circuit also stated that "Sicroff offered no defense of 'privilege' for his statements." *Id.* While Sicroff's petition is expressly premised on — and, indeed, is dependent on — the asserted "fact" that Sicroff believed that his statements were true when he made them, *see, e.g.*, Pet. i, 3, 13, the record submitted to the Ninth Circuit contains ***no*** such statement by Sicroff and ***no*** admissible evidence that Sicroff believed that his statements were true when made. Indeed, as noted, Sicroff provided no defense at all to Jett's evidence demonstrating that Sicroff knew that certain of his libelous statements were false when made.[2]

In determining whether the libel debt at issue in this case was nondischargeable under section 523(a)(6) of the Bankruptcy Code, the Ninth Circuit considered the "willful" and "malicious" elements separately. Pet. App. 8a (citing *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir. 2002), and *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1207-09 (9th Cir. 2001)). The Ninth Circuit noted that, in applying the applicable standard,

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[2] In stating that "the evidence tends to show that Sicroff believed those statements to be true," the bankruptcy court cited a letter from Sicroff to the editor of the California Aggie. Pet. App. 26a-27a. In that letter, Sicroff refers to documents that, according to the letter, proved Sicroff's libelous statements to be "facts." However, the Acting Vice Provost of the University testified at a deposition attended by Sicroff that, had Jett been the subject of "numerous and well-substantiated charges of professional misconduct" or been disciplined for "serious misbehavior," as Sicroff claimed, Jett's personnel file would have contained documents reflecting such charges and disciplinary action, but that Jett's file contained no such documents. In addition, the letter is pure hearsay; none of the alleged documents referred to in the letter were ever produced; and Sicroff did not testify concerning any aspect of the alleged truth of his assertions or the statements in the letter, or that he actually believed any particular statement to be true. Accordingly, as noted, the record is devoid of any statement by Sicroff or any admissible evidence that Sicroff believed the truth of any of his libelous statements at the time that he made them.

the court may consider "circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action" as well as "what a debtor may admit to knowing." Pet. App. 8a (quoting *In re Su*, 290 F.3d at 1146 n.6) (internal quotation marks omitted).

As to the "willfulness" element, the court noted that Sicroff had "explicitly conceded" that his conduct was "willful and intentional" for purposes of determining nondischargeability, and that he had "offered no evidence that could counterbalance the weight of his concession." Pet. App. 8a. Indeed, the record indicates that Sicroff conceded, not only that his ***conduct*** was willful, but that Jett had satisfied the "willful injury" ***element*** of section 523(a)(6), leaving only the question whether the injury also was malicious.[3] Accordingly, the Ninth Circuit concluded correctly that, because of Sicroff's concessions, "we do not need to apply the analysis set out in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), in which the Supreme Court addressed the question of when an injury is 'willful.'" *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 n.4 (9th Cir. 2005).[4]

Sicroff insists in his petition that he conceded only that his libelous conduct was intentional; not that he intended to injure Jett. *See* Pet. 3, 6, 7, 15. As noted, however, the record indicates

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[3] For example, Sicroff's counsel stated at trial that his "position is it's not the level of maliciousness to avoid dischargeability." AER 470. Counsel stated further: "The whole point here is that we know this is willful, the question is: is it malicious? . . . If it's not malicious, then the debt is discharged . . . . [W]hat really happened here was not malicious." AER 474. Counsel also stated: "I guess my point in coming here and saying: 'Accept all his facts; I don't think that you've raised to that level of malicious.'" AER 477; *see also* Pet. App. 8a (noting that "Sicroff explicitly conceded that his behavior was 'willful and intentional' for purposes of the dischargeability hearing").

[4] The Court should be aware that the footnote in the Ninth Circuit's decision containing this statement was inadvertently omitted from the reprinted version of the decision that appears in Petitioner's Appendix. For this reason, the published opinion is cited here.

otherwise. In any event, even if Sicroff had not made any concessions, the Ninth Circuit also concluded, based on its own review of the record, that the evidence clearly demonstrated Sicroff's "intent to injure Jett." Pet. App. 10a. Accordingly, the Ninth Circuit's analysis includes, not only a discussion of the willful nature of Sicroff's conduct, but also the willful nature of the resulting injury.

As for "maliciousness," the Ninth Circuit, based on its review of the record, stated as follows:

> In the case before us, we similarly must conclude that Sicroff's goal of protesting the Geography Department's closure did not provide just cause or excuse to calumniate Jett's professional reputation. Not only were his libelous statements legally wrongful, but Sicroff went well beyond the scope of his legitimate goal to attack Jett by name. When the California Aggie first printed his letter on April 22, 1993, it prudently excised the personalized attacks against Jett and Bahre. In response to this edit, Sicroff sent a second letter, which the newspaper reprinted on April 26, 1993, complaining that "[t]he edited version of my letter that you printed April 22 about the geography department . . . did not at all represent the main point of the letter" and inviting "readers [who] would like the full text of the letter [to] please drop me a note at the geography department." This action demonstrates a specific intent to injure Jett over and above otherwise legitimate protest. For these reasons, the bankruptcy court erred in its interpretation of the phrase "just cause and excuse" and in its conclusion that Sicroff's defamation was not malicious by virtue of its connection to a larger, legitimate purpose. We hold

> instead that Sicroff's libelous statements were not made with just cause and excuse and that, as a result, they were malicious.

Pet. App. 10a (footnote omitted).

REASONS FOR DENYING THE PETITION

Sicroff contests the Ninth Circuit's conclusion that his libel obligation constitutes a debt "for willful and malicious injury" under section 523(a)(6) of the Bankruptcy Code. In support of his argument, Sicroff relies heavily on his assertions that (i) the bankruptcy court made a "factual finding — undisturbed on appeal — that the debtor believed his statements to be true when he published them" and (ii) "California law requires no more than a finding of negligence as to truth or falsity to support a libel verdict and none of the lower courts found (or suggested that the record would support a finding) that the Petitioner was more than negligent in believing his statements to be true." Pet. 3. Sicroff contends that the decision below therefore "conflicts with and undermines" this Court's decision in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), and also conflicts with the decision of the Fifth Circuit in *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 606 (5th Cir. 1998), and with the decisions of the Sixth Circuit in *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986), and *Kennedy v. Mustaine (In re Kennedy)*, 249 576, 581, 582-83 (6th Cir. 2001). Pet. 8.

These assertions are unsound. First, the record contains no statement by Sicroff and no admissible evidence that Sicroff actually believed that his libelous statements were true when he made them. Indeed, the record contains contrary evidence; i.e., that Sicroff must have known that at least some of his libelous statements were false at the time of their making and that Sicroff continued to make libelous statements even after the falsity of these statements was confirmed by the University. Accordingly, Sicroff's case does not fit within the scope of the question that he has presented for review — "[w]hether a debt

for libel is nondischargeable under Section 523(a)(6) of the Bankruptcy Code, which exempts from the discharge debts for 'willful and malicious injury,' ***when the debtor believed the libelous statement to be true when it was made.***" Pet. i (emphasis supplied).

Second, regardless of whether California law permits a judgment for libel based on no more than a finding of mere negligence, the record demonstrates that Sicroff (i) made numerous libelous statements against Jett; (ii) had to have known that at least some of his libelous statements were false when he made them; (iii) continued to libel Jett after his libelous statements were shown to be false; (iv) made the libelous statements with the specific intent to injure Jett; (v) conceded that he had acted "willfully" for purposes of determining the dischargeability of his debt to Jett under section 523(a)(6); and (vi) intentionally injured Jett without just cause or excuse. The Ninth Circuit properly concluded that Sicroff's conduct satisfied the "willful" and "malicious" injury elements of the statute. Accordingly, the Ninth Circuit correctly determined that the libel debt at issue was nondischargeable under section 523(a)(6).

The decision of the Ninth Circuit is consistent with this Court's decision in *Geiger* and with the decision of the Fifth Circuit in *Miller* and the decisions of the Sixth Circuit in *Wheeler* and *Kennedy*. To the extent that some aspect of the Ninth Circuit's analysis diverges from aspects of decisions from the Fifth and Sixth Circuits, this case nevertheless neither requires nor presents the appropriate vehicle for the Court's intervention, as there is no basis from which to conclude that the result would be any different under these other decisions. Indeed, review of these other decisions demonstrates that the outcome would be the same.

A. The Writ Should Be Denied Because The Decision Below Comports With Applicable Supreme Court Precedent.

1. The applicable Supreme Court precedent

Sicroff claims that the Ninth Circuit's analysis "was premised on a misguided, and unduly narrow, interpretation of this Court's decision in *Geiger*"; failed to acknowledge that "*Geiger* made quite clear that an injury is 'willful and malicious' only if the debtor intended to cause legal injury, and not if the debtor acted negligently or even recklessly"; and "implausibly read *Geiger* to leave intact much of the Ninth Circuit's pre-*Geiger* caselaw, under which conduct was 'malicious' if it lacked 'just cause and excuse,' and no intent to injure was required." Pet. 3. It is Sicroff's analysis, however, that is in error, as the decision below is fully consistent with *Geiger*.

a. The *Tinker* case

Tinker v. Colwell, 193 U.S. 473 (1904), discussed by the Court in *Geiger*, was the first case to address the "willful and malicious" injury exception to the bankruptcy discharge, as set forth in the Bankruptcy Act of 1898. In *Tinker*, respondent Colwell had obtained a state-court judgment against Tinker for "criminal conversation" with Colwell's wife. 193 U.S. at 480. The Court held that Tinker's debt involved a "willful and malicious" injury to Colwell and, therefore, the debt was nondischargeable, even if Tinker's actions were motivated by his passion for Mrs. Colwell, rather than "personal malevolence" or "special malice" toward Mr. Colwell. 193 U.S. at 485.

The Court held that the "willful" element of the exception was satisfied because Tinker committed the act voluntarily and intentionally and that the "malicious" element was satisfied by proof that Tinker had committed a wrongful act, done intentionally, and without just cause or excuse. 193 U.S. at 485-86.

When the Bankruptcy Code was revised in 1978, the "willful and malicious" injury exception to the discharge remained. In reenacting what is now section 523(a)(6), the United States Senate and the United States House of Representatives each stated that they intended the word "willful" to mean "deliberate or intentional," and that to "the extent that *Tinker v. Colwell* . . . held" that a 'less strict' (Senate), or 'looser' (House)," standard is intended . . . [it is] overruled." *See Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 850-51 (8th Cir. 1997) (en banc) (quoting S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, and H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963). Both houses of Congress also stated that they intended to overturn any cases that had applied "a 'reckless disregard' standard" in deciding whether debts were not dischargeable." *Id.*

b. The *Geiger* case

In the *Geiger* case, the creditors alleged that debtor Geiger could not discharge a medical malpractice debt because the malpractice judgment gave rise to a debt for "willful and malicious" injury under section 523(a)(6) of the Bankruptcy Code. *Kawaauhau v. Geiger (In re Geiger)*, 172 B.R. 916, 920 (E.D. Mo. 1994). The bankruptcy court agreed, holding that Geiger's treatment was so far below the standard level of care that it could be categorized as "willful and malicious" conduct. 172 B.R. at 923. On appeal, the district court affirmed, based on Geiger's admission that he knew that he was providing substandard care. *Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 850-51 (8th Cir. 1997). According to the district court, this admission rendered Geiger's conduct "willful," and "the fact that Geiger's conduct 'was certain or substantially certain to cause physical harm' rendered it malicious within the meaning of" section 523(a)(6). *Id.*

On rehearing en banc, the Eighth Circuit reversed, concluding that the standard to be applied in determining whether Geiger's conduct was "willful" was whether Geiger

intended to cause the consequences of his act or at least believed that the substandard care would result in the consequence that occurred — amputation of the patient's leg. 113 F.3d at 854. The Eighth Circuit held that Geiger's conduct was not willful because there was no evidence to suggest that Geiger intended that the patient suffer serious consequences. 113 F.3d at 852. At most, the debt was attributable to negligent or reckless conduct, not to an intentional tort. *Id.* at 853. Based upon the foregoing analysis, the Eighth Circuit held that the debt was dischargeable. *Id.* at 853-54. Significantly, the Eighth Circuit expressly acknowledged that section 523(a)(6) requires that the injury at issue be ***both*** "willful" and "malicious" and explicitly limited the scope of its holding to the determination of what must be shown to establish "willfulness" under the statute:

> Finally, we observe that in this case we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be "willful." We express no view, however, on the question of whether it is sufficient for nondischargeability that the judgment be for an intentional tort. We note in this connection that 11 U.S.C. § 523(a)(6) requires that the injury be both "willful and malicious" before an entitlement to the exception to discharge arises. . . . Since it is not necessary to a decision in this case that we decide the meaning of the word "malicious" and the bearing, if any, that the interpretation given to that word might have on the dischargeability of a judgment debt, we have no occasion to discuss the matter, and thus we venture no opinion on it.

113 F.3d at 852-53.

This Court framed the question presented in *Geiger* as follows: Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury . . . , or only acts done with the actual intent to cause injury . . . ?" 523 U.S. at 61. Like the Eighth Circuit, this Court answered the question by focusing its analysis on the term "willful." The Court reasoned:

> The word "willful" in [section 523](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury."

523 U.S. at 61. The Court went on to hold that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." 523 U.S. at 64. In so doing, the Court rejected the petitioners' "more encompassing interpretation [that] could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor in fact anticipated by the debtor." 523 U.S. at 61.

In the course of its decision, this Court rejected the petitioners' reliance on certain statements in the *Tinker v. Colwell* decision in support of their argument that acts done intentionally that cause unintended injury satisfy the "willful" element of section 523(a)(6). The Court explained: "*Tinker* thus placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding. That decision, we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment

debt must be 'for willful and malicious injury.'" 523 U.S. at 62-63.[5]

2. The decision below is fully consistent with Supreme Court precedent.

The petition assumes that the Ninth Circuit committed legal error by separately considering the "willful" and "malicious" elements of section 523(a)(6). Pet. 3. This assumption is baseless.

As a threshold matter, it should be noted that this Court denied certiorari review in *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir.), *cert. denied*, 533 U.S. 930 (2001), one of the post-*Geiger* cases cited by the Ninth Circuit in stating that the two elements are analyzed separately.

Moreover, as noted, the Eighth Circuit acknowledged in its decision in *Geiger* that section 523(a)(6) requires that the injury at issue be both "willful" and "malicious" and limited the scope of its holding to the determination of what must be shown to establish "willfulness" under the statute. 113 F.3d at 852-53. Accordingly, the issue before this Court in the *Geiger* case was whether the Eighth Circuit's interpretation of the "willful" element was correct. There is no basis to conclude from the fact that the Court focused only on the "willful" element in its analysis that *Geiger* established, *sub silentio*, a new "unitary" standard for determining nondischargeability under section 523(a)(6). After all, given that the statute, by its terms, requires both "willfulness" and "maliciousness," the Court's conclusion in *Geiger* that "willfulness" had not been established was dispositive of the question whether the debt at issue was nondischargeable and there simply was no reason for the Court to consider the "malicious" element. *See Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999) ("From

[5] Defamation is generally regarded as an intentional tort. *See Farmers Educ. & Co-op. Union of Am., ND Div. v. WDAY, Inc.*, 360 U.S. 525, 542 (1959).

the plain language of the statute, the judgment must be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt.").

Nor does anything in the *Geiger* decision require or mandate that the two terms employed by Congress in section 523(a)(6) — "willful" and "malicious" — be conflated or that courts are no longer to consider the "malicious" element in determining nondischargeability under this provision. Indeed, for the Court to have so construed section 523(a)(6) would contravene a settled canon of statutory construction that was discussed in *Geiger* itself — i.e., that "'we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" 523 U.S. at 62 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)). *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."); *see also In re Markowitz*, 190 F.3d at 463 ("From the plain language of the statute, the judgment must be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt."); 4 ALAN N. RESNICK, ET AL., COLLIER ON BANKRUPTCY ¶ 523.12[2], 523-90 (15th ed. 2004) ("The requirements of 'willfulness' and 'maliciousness' are distinct requirements in the statutory text and are usually treated as such by the courts.").

Furthermore, nothing in the *Geiger* decision precludes courts from conducting an analysis of section 523(a)(6) that considers the "willful" element and the "malicious" element separately, as long as the rule of *Geiger* is not violated in the process — i.e., as long as debts for unintentional injuries are not held to be nondischargeable under section 523(a)(6). 523 U.S. at 64. Indeed, although this Court, in *Geiger*, rejected *Tinker* to the extent that it suggests that acts done intentionally that cause unintended injury are "willful and malicious" for purposes of section 523(a)(6), *see Geiger*, 523 U.S. at 62-63,

the Court did not abrogate *Tinker*'s statement of the "malicious" element of section 523(a)(6) as "a wrongful act, done intentionally, without just cause or excuse," *see Tinker*, 193 U.S. at 485-86. Thus, if a court concludes in its determination of nondischargeability under section 523(a)(6), as the Ninth Circuit did in the decision below, that a debtor intended to cause injury to the creditor, there is no conflict with *Geiger*, notwithstanding that the minimum requirements of the legal standard applicable to determining liability for the underlying claim may be negligence or recklessness.

The decision below does not violate the rule of *Geiger*. As to the "willful" element, the Ninth Circuit found that Sicroff had explicitly conceded that his behavior was "willful and intentional" and had "offered no evidence that could counterbalance the weight of his concession." Pet. App. 8a. As noted, the record indicates that Sicroff conceded that the "willful" element of the section 523(a)(6) inquiry had been established for purposes of determining nondischargeability. *See* footnote 3, *supra*. Given this concession — essentially, a stipulation — the Ninth Circuit properly concluded that it was not necessary to apply the Court's analysis in *Geiger*, which focused on the requirements for establishing the "willful" element of section 523(a)(6). *See Jett*, 401 F.3d at 1106 n.4. Surely, this Court need not intervene in this case in order to save Sicroff from the consequences of his own admission. More importantly, it does not follow from the Ninth Circuit's acceptance of Sicroff's concession as establishing the "willful" element of section 523(a)(6) that the decision below contravenes the rule of *Geiger*.

Sicroff makes much of the claimed "fact" that he believed his statements to be true when he published them and his assertion that "California law requires no more than a finding of negligence as to truth or falsity to support a libel verdict and none of the lower courts found (or suggested that the record would support a finding) that the Petitioner was more than

negligent in believing his statements to be true." *See* Pet. 3, 13. Neither of these contentions supports the petition's argument that the Ninth Circuit's decision "conflicts with and undermines" *Geiger*.

First, although the decision below did not specifically mention the bankruptcy court's statement that "the evidence tends to show that [Sicroff] believed those statements to be true," Pet. App. 26a-27a, the Ninth Circuit determined that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious. Pet. App 8a. Moreover, the record submitted to the Ninth Circuit contains no statement by Sicroff and no admissible evidence that Sicroff believed that his statements were true when he made them. Indeed, as noted, the record contains evidence that Sicroff must have known that at least some of his libelous statements were false at the time he made them and that Sicroff continued to libel Jett even after the University confirmed the falsity of his statements.

Furthermore, as discussed above, the Ninth Circuit expressly noted that courts may consider "circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action as well as "what a debtor may admit to knowing." Pet. App. 8a (quoting *In re Su*, 290 F.3d at 1146 n.6) (internal quotation marks omitted). The Ninth Circuit observed from its independent review of the record that "[t]he bankruptcy court determined that statements in the April 17, 1993 letter regarding 'numerous and well-substantiated charges of professional misconduct' were false and Sicroff's counsel did not disagree," and that "[t]he record also shows that Jett had not been disciplined for 'serious misbehavior' and that he had not brought a 'continuous barrage of specious complaints' against the department chair," as Sicroff stated in the April 17, 1993 letter. Pet. App. 7a.

Sicroff is simply wrong in suggesting that the minimum requirements of California law with respect to proving libel

claims is dispositive of the entirely distinct question whether the Ninth Circuit erred in determining, on the record before it, that the debt at issue was nondischargeable under section 523(a)(6) of the Bankruptcy Code. *See Mills v. Ellerbee (In re Ellerbee)*, 177 B.R. 731, 742 (Bankr. N.D. Ga. 1995) ("Whether the statements were true or false, Ellerbee knew that their publication would necessarily lead to injury. Reckless though he may have been about the truth, he was deliberate about causing injury. Therefore, because he acted intentionally to inflict harm on Mills, Ellerbee acted willfully for purposes of section 523(a)(6). The Debtor offered no evidence to the contrary."), *aff'd sub nom. Ellerbee v. Mills*, 78 F.3d 600 (11th Cir.) (table), *cert. denied*, 519 U.S. 947 (1996).

Contrary to Petitioner's argument, the decision below did ***not*** hold that an injury inflicted negligently or recklessly is nondischargeable under section 523(a)(6); nor did it hold that the section 523(a)(6) exception requires no intent to injure. Rather, the Ninth Circuit properly accepted Sicroff's concession regarding the willfulness requirement and went on to conclude that Sicroff's conduct also was "malicious" for purposes of section 523(a)(6), based, in part, upon its independent determinations that "Sicroff went well beyond the scope of his legitimate goal to attack Jett by name," and that Sicroff's actions "demonstrate[d] a specific intent to injure Jett over and above otherwise legitimate protest." Pet. App. 10a. That the Ninth Circuit made its determination of specific intent to injure in the context of its analysis of the "malicious" element, rather than the "willful" element, provides no basis for certiorari review.

B. The Writ Should Be Denied Because The Decision Below Does Not Conflict With Decisions Of The Fifth And Sixth Circuits, And To The Extent That There Is Any Disagreement, This Case Neither Requires Nor Presents The Appropriate Vehicle For The Court's Intervention As The Result Would Be The Same Under The Cases Cited By Petitioner.

Sicroff contends that

> [t]he Ninth Circuit's construction of the 'malicious injury' requirement, under which an injury may be malicious even if the debtor was merely negligent and had no intent to cause legally cognizable injury, presents a square conflict with the Fifth Circuit's holding that to satisfy the 'malicious' requirement, legally cognizable injury must have actually been intended by the debtor or so certain to result that the injury is deemed intentional.

Pet. 8-9 (citing *Miller*, 156 F.3d at 606). He contends further that the decision below conflicts with the decisions of the Sixth Circuit in *Wheeler*, 783 F.2d at 615, and *Kennedy*, 249 F.3d at 581, 582-83, based upon the assertion that these decisions require that a debt for libel cannot be excepted from the discharge under section 523(a)(6) unless the debtor was aware that the defamatory statements were false when the statements were made. Pet. 8, 11-14. Neither of these asserted "conflicts" warrants certiorari review of this case.

1. The decision below does not conflict with the Fifth Circuit's decision in *Miller* in the manner represented by Petitioner and the result in the decision below would have been the same under *Miller* in any event.

As noted, the Ninth Circuit cited its post-*Geiger* decision in *In re Jercich* in stating that the "willful" and "malicious"

elements of section 523(a)(6) are to be analyzed separately. Pet. App. 8a (citing *In re Jercich*, 238 F.3d at 1207-09). The Ninth Circuit also cited *In re Jercich* in stating its test for determining whether the "malicious" element has been established, as follows: "An injury is 'malicious,' as that term is used in Section 523(a)(6), when it is: '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" Pet. App. 8a (quoting *In re Jercich*, 238 F.3d at 1209). Although the petition does not explicitly claim error requiring certiorari review with respect to the Ninth Circuit's separate analysis of the two elements of section 523(a)(6), it does contend that the Ninth Circuit's test for the "malicious" element conflicts with the Fifth Circuit's decision in *Miller*, 156 F.3d at 606. To the extent that there is any conflict between the decision below and the *Miller* decision, it does not warrant certiorari review of the instant case.

In *Miller*, the Fifth Circuit concluded that *Geiger* mandates that the "willful and malicious injury" exception to the discharge is a "unitary concept" and held that "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or subjective motive to cause harm." 156 F.3d at 603, 606.

It is true that, in contrast to the Fifth Circuit, the Ninth Circuit, among other courts — e.g., the Sixth Circuit, *see In re Markowitz*, 190 F.3d at 463 — continues to analyze the "willful" and "malicious" elements of section 523(a)(6) separately. But there is no basis to conclude from this difference that an actual conflict exists or that the decision below is an appropriate vehicle for certiorari review. As discussed in detail above, and as courts have correctly recognized in post-*Geiger* decisions, separate analysis of the two elements of section 523(a)(6) is fully consonant with both the plain language of the statute and the *Geiger* decision itself, which addressed only the element of "willfulness."

The discussion in the prior section also makes clear that application of the test applied by the Fifth Circuit in the *Miller* case — whether there is either an objective substantial certainty of harm or subjective motive to cause harm — to the record submitted to the Ninth Circuit in this case would ***not*** have changed the result, given that the Ninth Circuit expressly found that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious under section 523(a)(6), *see* Pet. App. 8a, and that Sicroff specifically intended to injure Jett, *see* Pet. App. 10a. Again, the minimum requirements of California law with respect to proving libel claims is ***not*** dispositive of the distinct question whether "maliciousness" (or "willfulness," for that matter) has been established for purposes of determining nondischargebility under section 523(a)(6) of the Bankruptcy Code. Moreover, contrary to Sicroff's contention, the decision below held neither that an injury inflicted negligently or recklessly is nondischargeable under section 523(a)(6) nor that the section 523(a)(6) exception requires no intent to injure.

2. Certiorari review of the decision below is not warranted based upon the asserted conflict with the decisions of the Sixth Circuit in *Wheeler* and *Kennedy*.

Sicroff contends that the decision below "is in direct conflict with the Sixth Circuit's decision in *Wheeler v. Laudani*, 783 F.2d 610 (6th Cir. 1986), which held that a defamatory statement is "willful and malicious injury" under § 523(a)(6) only if the debtor knew the statement was false when it was made" and is "also at odds with the Sixth Circuit's decision in *Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576 (6th Cir. 2001), which held that a libel debt was nondischargeable precisely because the debtors continued to make their statements even after receiving clear proof that the statements were false." Pet. 4. *See* Pet. 11-13. Again, to the extent that there is any conflict, there is no basis for certiorari review of the decision below.

a. The *Wheeler* case

The issue before the Sixth Circuit in the (pre-*Geiger*) *Wheeler* case was whether the bankruptcy court correctly entered summary judgment in favor of the creditors in their adversary proceeding to determine whether a state-court libel judgment against the debtor, which was based upon a jury verdict, was nondischargeable under section 523(a)(6). Applying a pre-*Geiger* test for nondischargeability — "a wrongful act done intentionally which necessarily produces harm and is without just cause or excuse" — the bankruptcy court concluded that the jury verdict, which found the debtor liable for defamation in a public-figure case, encompassed within it a finding that the debtor had willfully and maliciously injured the creditors and, therefore, that the debt based upon the libel judgment was nondischargeable. 783 F.2d at 614. According to the bankruptcy court, there was no disparity between the standard considered by the jury in determining liability for defamation and the test for determining "willful and malicious conduct" for purposes of section 523(a)(6). *Id.*

In the course of its analysis, the Sixth Circuit stated that the "malicious" element of section 523(a)(6) "does not require ill-will or specific intent to do harm"; that "[t]he intentional tort of libel meets the requirements of § 523(a)(6) for non-dischargeability when the debtor/author knows the published statements were false"; and that "[m]ere reckless disregard for the truth or falsity of the statement, which can support a libel verdict, is not a willful and malicious injury for purposes of § 523(a)(6)." 783 F.2d at 615 (citations omitted). The Sixth Circuit concluded that "the case was not in proper posture for summary judgment" because the record before it did not reveal whether the jury's verdict rested on a finding that the debtor had acted recklessly or whether he had acted knowingly. *Id.*

Several points are clear. First, Sicroff's representation that the Sixth Circuit concluded in *Wheeler* that the debt at issue in that case "was not for 'willful and malicious injury' and was

dischargeable," *see* Pet. 12, is demonstrably in error. The *Wheeler* decision concludes simply that "genuine issues of material fact exist which render this case in its current posture inappropriate for summary judgment." 783 F.2d at 615. Based upon this conclusion, the court remanded the case, directing the bankruptcy court to review the trial transcripts in the underlying libel case and determine what findings were encompassed within the jury verdict and judgment. *Id.* at 15-16.

Second, Sicroff's representation that *Wheeler* "held that a defamatory statement is 'willful and malicious injury' under § 523(a)(6) only if the debtor knew the statement was false when it was made," *see* Pet. 4, also is inaccurate. *See also* Pet. 11 (erroneously asserting that the *Wheeler* and *Kennedy* decisions "provide that in order for a claim for libel to be a debt for 'willful and malicious injury' the debtor must have been aware that the statements in question were false when he made them"). The Sixth Circuit did not so hold and its statement that "[t]he intentional tort of libel meets the requirements of § 523(a)(6) for non-dischargeability when the debtor/author knows the published statements were false," 783 F.2d at 615, is wholly insufficient to bear the weight of Sicroff's contention. It is simply wrong as a matter of law and logic to equate a statement concerning a circumstance that satisfies the requirements of section 523(a)(6) with a holding that the requirements of section 523(a)(6) are met ***only*** when such a circumstance is present. Equally erroneous is the petition's central assumption that the minimum legal requirements for proving libel claims is dispositive of the distinct question whether "maliciousness" (or "willfulness") has been established for purposes of determining nondischargebility under section 523(a)(6) of the Bankruptcy Code.

Furthermore, and as also discussed above, although the decision below did not specifically mention the bankruptcy court's statement that "the evidence tends to show that [Sicroff]

believed those statements to be true," Pet. App. 26a-27a, the Ninth Circuit determined nonetheless that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious. Pet. App 8a. And, again, the record submitted to the Ninth Circuit contains no statement by Sicroff and no admissible evidence that Sicroff believed that his statements were true when he made them. On the other hand, the record does contain evidence that Sicroff must have known that at least some of his libelous statements were false at the time he made them and that Sicroff continued to libel Jett even after the University confirmed the falsity of his statements.

Finally, the decision below did ***not*** hold that section 523(a)(6) requires no intent to injure or that an injury inflicted negligently or recklessly is nondischargeable under section 523(a)(6), as the petition claims. To the contrary, the Ninth Circuit properly accepted Sicroff's concession that his conduct was "willful" for purposes of determining nondischargeability as establishing this element and separately concluded that Sicroff's conduct also was "malicious" for purposes of section 523(a)(6), based, in part, upon its independent determinations that "Sicroff went well beyond the scope of his legitimate goal to attack Jett by name," and that Sicroff's actions "demonstrate[d] a specific intent to injure Jett over and above otherwise legitimate protest." Pet. 10a.

b. The *Kennedy* case

Nor does the Sixth Circuit's decision in the *Kennedy* case provide a basis for concluding that certiorari review of the decision below is warranted.

As an initial matter, it is important to note that the petition inaccurately represents that the *Kennedy* decision (and the *Miller* decision) "provide that in order for a claim for libel to be a debt for 'willful and malicious injury' the debtor must have been aware that the statements in question were false when he made

them," Pet. 11, and that "*Kennedy* only strengthened and reaffirmed *Wheeler*'s ultimate holding that a libelous statement could not constitute 'willful and malicious injury' if the debtor believed the statement to be true when made," Pet. 12 n.6. Sicroff's error regarding the claimed "ultimate holding" in *Wheeler* is discussed above. As for the *Kennedy* decision, it mentions *Wheeler* only once — in the context of stating that the case had been overruled by *Geiger*.[6] *See Kennedy*, 249 F.3d at 580. Nowhere does the *Kennedy* decision state anything that bears resemblance to the proposition that, "in order for a claim for libel to be a debt for 'willful and malicious injury' the debtor must have been aware that the statements in question were false when he made them," as the petition asserts. Pet. 11.

In *Kennedy*, the Sixth Circuit determined that a debt for libel was nondischargeable under section 523(a)(6), based upon prior state-court judgments that established the elements of the creditors' defamation claim and the application of its post-*Geiger* decision in *In re Markowitz*, in which the Sixth Circuit interpreted *Geiger* to require that, "unless the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it, he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." *Markowitz*, 190 F.3d at 464 (internal quotation marks and citation omitted). In reaching its conclusion that the lower courts were correct in determining that the claim at issue was nondischargeable under section 523(a)(6), the *Kennedy* Court explained:

In rendering its decision, the bankruptcy court opined as follows:

> In summation, this Court finds that the facts necessary to support a determination of nondischargeability under § 523(a)(6) of the

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[6] Sicroff discusses the import of *Geiger*'s overruling of *Wheeler* in footnote 6 of the petition. *See* Pet. 12.

> Plaintiffs' defamation claim are clearly established by the prior Kentucky and Michigan judgments. First, the Michigan judgment establishes that the statements at issue were in fact made, while the Kentucky judgment establishes that they were defamatory in character and intentional in nature. Second, the Kentucky judgment establishes that the statements were inherently injurious, giving rise to an inference of an expectation of harm and intent to injure. Lastly, the Michigan judgment expressly established that the statements were made without just cause or excuse.

In finding that the bankruptcy court did not err in rendering this decision, the district court stated:

> Appellants argue that the trial court [bankruptcy court] denied full faith and credit to the Michigan judgment by imputing the more stringent "intentional" standard used in Kentucky when the Michigan court had not found "intent." Appellants argue that the Bankruptcy Court was only able to impute "intent" by looking at the Kentucky judgment. However, it is not merely Kentucky law, but Michigan law as well, that words imputing lack of chastity are defamatory *per se*, i.e., injurious by their nature.[7] Furthermore, the Michigan judgment found that the Kennedys made their injurious statements even after they knew that DNA tests had conclusively established the falsity of the injurious

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[7] Respondent argued below that the statements at issue in this case constitute libel *per se* under California law. *See* Cal. Civ. Code § 45 ("Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."). California law is similar to Michigan law on this point.

statements. Thus, even without reference to the Kentucky judgment, it is apparent that the debt is nondischargeable, consistent with *Kawaauhau*. . . .

Under Michigan law, words as to a lack of chastity are defamation *per se* — i.e., injurious by their nature; it therefore was unnecessary for the bankruptcy court to consider the Kentucky judgment in order to find that Debtors were estopped from litigating whether these defamatory statements were intentional and substantially certain to cause harm for purposes of § 523(a)(6).

The court noted that when the words at issue [are defamatory *per se*], "injury to the reputation of the person is presumed. . . ." Accordingly, as found by the district court, under Michigan law it is presumed that when Debtors made statements as to Creditors' chastity in the case at hand, they were substantially certain that harm would result because such statements are considered defamation *per se*. In addition, the Michigan court also made reference to the fact that Debtors made these statements intentionally inasmuch as Debtors continued to make the statements to third parties even after they became aware of the results of the DNA paternity tests which excluded Wilbur as Debtor Diane Kennedy's father.

Therefore, even if an argument could be made that the bankruptcy court should not have considered both the Michigan as well as the Kentucky state court judgments, as the district court properly concluded, the outcome does not change inasmuch as the Michigan judgment in and of itself precludes litigation of this issue because the statements at issue are defamation *per se* under Michigan law, meaning that the courts presume that the speakers make such statements knowing that substantial harm or injury

> will result. *See Markowitz*, 190 F.3d at 464 (holding that "unless 'the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)").

Kennedy, 249 F.3d at 581-83 (citations omitted).

The decision below is fully consistent with the *Kennedy* decision. As has been shown, the Ninth Circuit determined that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious, Pet. App 8a, and the record submitted to the Ninth Circuit contains no statement by Sicroff and no admissible evidence that Sicroff believed that his statements were true when he made them.

Sicroff finds it significant that the debtor in *Kennedy* "continued to make the statements in question even after receiving clear proof that the statements were false; . . . thus, it is clear that in making the statements, the [debtors] intended injury." Pet. 12-13. This factor, however, serves only to demonstrate that the decision below is entirely consistent with *Kennedy*: As noted, the record contains evidence that Sicroff must have known that at least some of his libelous statements were false at the time he made them and that he continued to libel Jett even after the University confirmed the falsity of his statements. Furthermore, the Ninth Circuit expressly determined, based upon its own review of the record before it, that "Sicroff went well beyond the scope of his legitimate goal to attack Jett by name," and that Sicroff's actions "demonstrate[d] a specific intent to injure Jett over and above otherwise legitimate protest." Pet. 10a.

CONCLUSION

The record is barren of any statement by Sicroff or any admissible evidence that Sicroff believed that his libelous statements were true when made. Accordingly, the facts of this case place it outside the scope of the question that Sicroff has presented for review. In addition, the decision of the Ninth Circuit correctly applies section 523(a)(6) of the Bankruptcy Code in a manner consistent with the applicable precedents of this Court and the decisions of other courts of appeals. Furthermore, the outcome would be the same under the decisions of other courts of appeals cited by Sicroff. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SETH E. SICROFF,

Petitioner,

v.

STEPHEN C. JETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The bankruptcy court in this case made a finding of fact that Petitioner Sicroff believed his statements were true at the time he made them. The basic premise of Respondent Jett's Opposition is that that finding of fact is erroneous. But the district court rejected that claim. And even Jett acknowledges that this finding was never mentioned—let alone reversed—by the Ninth Circuit. Opp. 16. So, as the case reaches this Court, it presents the question whether a debt for libel can be for "willful and malicious" injury when the debtor believed the statements to be true when made. Jett cannot now manufacture a "vehicle problem" by challenging factual findings that were undisturbed on appeal.

The petition explained that the Ninth Circuit's decision below openly splits with the Fifth Circuit's decision in *Miller* v. *J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998), which held that a debt is not for "willful and malicious" injury under Section 523(a)(6) of the Bankruptcy Code unless the debtor intended to inflict a legally cognizable injury on the plaintiff. Pet. 8-11. The petition further explained that the decision also splits with the Sixth Circuit's decision in *Wheeler* v. *Laudani*, 783 F.3d 610 (6th Cir. 1986), which held that a debt for libel is not one for "willful and malicious" injury if the debtor believed that the statements were true when made. Pet. 11-13.

The Opposition acknowledges (at 19-20) these analytic differences between the Ninth Circuit's approach to this issue and those adopted by the Fifth and Sixth Circuits. Jett's argument that this case is not a proper vehicle for resolving this conflict is premised on his attack on the bankruptcy court's undisturbed findings of fact. And his argument that this case would come out the same way under the law of the Fifth or Sixth Circuits is another variant on the same theme. In truth, there is no disputing that the outcome of this case would be different under the construction of Section 523(a)(6) adopted in the Fifth and Sixth Circuits.

Kawaauhau v. *Geiger*, 523 U.S. 57 (1998), holds that, under Section 523(a)(6), the *injury* must be intentional, not just the act that causes the injury. But in many cases a debtor will take an action knowing that it may cause "harm,"

but believing that the action is nevertheless justified, and therefore not intending to cause any *legally cognizable* injury. In a libel case, for example, the debtor may make a statement knowing it may injure the plaintiff's reputation, but believing the statement to be true. Or in a case of battery, the debtor may intend to cause physical injury to another, believing genuinely (even if unreasonably) that the actions were necessary acts of self-defense. As the petition demonstrated, the circuits have divided on the question whether Section 523(a)(6) encompasses such conduct.

The Fifth Circuit has held that it does not. That court, treating the willful and malicious prongs as a "unitary inquiry," has held that, in order for a debt to be for either "willful" *or* "malicious" injury, the debtor must have intended to cause *legally cognizable* injury. *Miller*, 156 F.3d at 606 ("the debtor must have been aware that its act violated the legal rights of the creditor"). Under the *Miller* court's analysis, the debtor who intentionally inflicts harm in the "honest, but mistaken" belief that the harm was justified has not committed a "willful and malicious" injury. *Id.*

The Sixth Circuit gets to the same result, though perhaps by a different route. While Jett may be correct that the Sixth Circuit (like the Ninth) rejects the Fifth Circuit's "unitary inquiry," *see* Opp. 19; *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999), that court treats the question whether the defendant believed his actions were justified as part of the "malice" prong. *See Wheeler*, 783 F.2d at 615 ("'[m]alicious' means . . . without just cause or excuse"). And the Sixth Circuit has clearly held that a debt for libel is for "willful and malicious injury" only "when the debtor/author knows the published statements were false." *Id.* "Mere reckless disregard for the truth or falsity of the statement" is insufficient. *Id.*

Under the reasoning of the Ninth Circuit below, however, a debtor's belief that his actions were justified does not render the debt dischargeable, so long as the statements were in fact false, and he intended to cause "harm." Pet. App. 10a (finding "malice" because "Sicroff went well beyond the scope of his legitimate goal to attack Jett by

name"). That approach—which the Ninth Circuit openly acknowledged splits with the Fifth Circuit, *id.* at 10a n.4 (stating that *Miller* "conflates the elements of willfulness and malice in contravention of our clear precedents")—is outcome-determinative here.

More fundamentally, the Ninth Circuit's holding that a debt can be nondischargeable even where a debtor was merely negligent or reckless as to the presence of a "justification" for causing the harm (such as the truth of the statement) cannot be squared with *Geiger*, which makes plain that only debt for *intentional* injury is nondischargeable.

The split in authority is square, acknowledged, and properly presented. Not even Jett suggests that the conflict will disappear of its own accord absent this Court's intervention. The Court should grant certiorari to resolve it.

I. JETT'S EFFORT TO MANUFACTURE A "VEHICLE PROBLEM" REQUIRES HIM TO MISCONSTRUE THE RECORD

A. The Bankruptcy Court Found That Sicroff Believed His Statements Were True When Made, And That Finding Was Undisturbed On Appeal

The bankruptcy court squarely and properly rejected the underlying premise of Jett's Opposition—"that Sicroff knew that certain of his libelous statements were false when made" and "the record is barren of any statement by Sicroff or any admissible evidence that Sicroff believed that his libelous statements were true when he made them." Opp. i. The bankruptcy court, as the finder of fact, reached exactly the opposite conclusion: "While there can be no doubt that Debtor intentionally and repeatedly published his untrue statements about Plaintiff, the evidence tends to show that he believed those statements were true and, in his opinion, explained the real cause for the proposal to close the Geography Department." Pet. App. 26a-27a.

That factual finding was not disturbed by either the district court or the Ninth Circuit. The district court flatly rejected the claim Jett repeatedly invokes: "[T]he record does not demonstrate that [Sicroff] believed or knew that his statements were false. In all the evidence presented by appellant to the bankruptcy court, there is none, circumstantial

or otherwise, that tends to establish what the debtor must have actually known when taking the injury-producing action. [Jett's] evidence . . . does not suggest that Sicroff did not believe his statements were true." Pet. App. 21a.

The Ninth Circuit never even mentioned—let alone reversed—this specific factual finding made by the bankruptcy court. Jett is thus left to engage in his own *de novo* review of the bankruptcy court's findings, from which he concludes that "there is no admissible evidence that Sicroff believed his statements were true when he made them." Opp. 16. But the bankruptcy court, which actually heard the evidence, concluded otherwise. Jett's challenge to these findings is thus barred by the long-accepted "two-court rule," under which findings of fact left undisturbed on appeal are not subject to reconsideration in this Court absent "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prods.*, 336 U.S. 271, 275 (1949).[1]

At bottom, Jett's Opposition does little more than take issue with undisturbed factual findings with which he disagrees. That cannot change the fact that as this case comes to this Court, those findings are taken as true. The case thus presents the question set out in the petition: Is a debt for libel nondischargeable when the debtor believed the libelous statement to be true when it was made?

B. The Record Is Clear That Sicroff's Only "Concession" Was That He Intended To Make The Allegedly Defamatory Statements

Jett also contends that certiorari should be denied here because Sicroff conceded below that the "willful" prong was satisfied. Opp. 5 & n.3. That is not true. In fact, the context makes unmistakably clear that Sicroff's counsel was acknowledging only that the statements were intentionally

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[1] Jett's argument that the bankruptcy court improperly relied on hearsay evidence—a letter Sicroff wrote to the editor of a college newspaper that pointed to other documentary evidence—to support its conclusion that Jett believed his statements were true (Opp. 4 & n.2, 7, 16) is wide of the mark. The bankruptcy court did not credit the evidence for the truth of its assertion, but only as evidence of Sicroff's subjective state of mind. *See* Fed. R. Evid. 801(c) (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted").

made.[2] Accordingly, there can be no serious argument that any "concession" provides a reason for denying the petition.[3] In any event, even if Sicroff had conceded that the "willful" prong was satisfied (which he did not), that would not make this case any less certworthy, since the Ninth Circuit splits with both the Fifth and the Sixth Circuit as to its treatment of the "malicious" prong—and since its approach clearly results in a different outcome.

II. THE NINTH CIRCUIT'S DECISION SPLITS WITH THE FIFTH AND SIXTH CIRCUITS

Jett focuses his Opposition on whether the Section 523(a)(6) requirements that the injury be "willful" and "malicious" to be nondischargeable should be understood as a "unitary concept," as the Fifth Circuit said in *Miller*, or as separate requirements, as the Ninth Circuit held here. Opp. 19. He contends that nothing in *Geiger* precludes courts from examining the "willful" and "malicious" elements separately, so long as "debts for unintentional injuries are not held to be nondischargeable." Opp. 14.

That is true as far as it goes, but fails to appreciate the substantive difference that the Ninth Circuit's approach makes in cases in which the debtor was merely negligent—not with respect to the act that caused the injury, but rather as to the presence or absence of a "justification" for committing that act. This issue arises not only in actions for libel where the debtor believed his statements were true, but also, for example, in actions for battery where the debtor mistakenly believed his actions were justified by self-

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[2] For the Court's convenience, the relevant passages of the nondischargeability hearing are reproduced in full in the Appendix to this Reply Brief. *See, e.g.*, App. 1a ("And the Court looks at it — it's obviously willful. I mean, *it's an intentional act.* It's 'willful and malicious' that has to exist to avoid dischargeability.") (emphasis added); App. 3a ("In fact, Mr. Whaley has acknowledged that they were intentional acts.").

[3] Nor is there merit to Jett's contention that certiorari should be denied because Sicroff did not travel from Nepal for, or present evidence at, the nondischargeability hearing. Opp. 2-3. Sicroff was represented at that hearing by counsel who argued, correctly and successfully, that the dischargeability of the debt was plain from the very evidence on which Jett was relying. App. 1a-2a, 7a.

defense, *see* Restatement (Third) of Torts § 33 cmt. e (2005) (noting that "in some cases an intentional tort is not highly culpable, as when an actor commits a battery, subjectively, but unreasonably, believing it to be justified by self defense"), or actions for conversion where the debtor believed, incorrectly, that he was authorized to take the property. [4]

The Ninth Circuit's reasoning is that in cases like these, so long as the debtor (a) intended to cause "harm" and (b) was wrong in believing that the harm was legally justifiable, there is no "just cause and excuse" for the debtor's actions and the debt is nondischargeable. Pet. App. 10a ("Not only were his libelous statements legally wrongful, but Sicroff went well beyond the scope of his legitimate goal to attack Jett by name.") The Fifth Circuit's "unitary inquiry," asking whether the debtor intended to cause a *legally cognizable* injury, leads to the opposite conclusion.[5] Alternatively, one could conduct "separate" inquiries as the Sixth Circuit did in *Wheeler*, such that "just cause and excuse" is part of the "malicious" prong. But in that case, the reasoning of *Geiger* requires (as the *Wheeler* decision does, but the decision below does not) that the debtor have knowledge that he is acting without "just cause or excuse." It cannot be enough that the debtor's belief that such "just cause and excuse" existed turned out to be incorrect. This disagreement on the meaning of Section 523(a)(6) can only be resolved by this Court.

A. The Decision Below Splits With The Fifth Circuit's Decision In *Miller*

Jett does not dispute the existence of a split between the decision below and the Fifth Circuit's decision in *Miller*. Instead, he argues only that the conflict "does not warrant certiorari review of the instant case." Opp. 19. But Jett's

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[4] *See Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934) (addressing, in action seeking a determination that a debt for conversion was nondischargeable, circumstance in which the debtor holds "an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed").

[5] As noted in the Petition (at 10 n.5), the Fifth Circuit has held that where there is "objective substantial certainty" of legally cognizable injury, such intent can be inferred.

argument to this effect is just a reprise of his attacks on the bankruptcy court's undisturbed findings of fact, contending that "on the record submitted to the Ninth Circuit in this case," the *Miller* reasoning would lead to the same result. That is wrong. *Miller* clearly reads *Geiger* to require that in order for an injury to be "willful" or "malicious," the debtor must have had an "actual intent to cause injury," 156 F.3d at 603, meaning a "legally cognizable injury," *id.* at 606. *See also id.* (describing its test as "quite close" to one proposed by commentators under which the debtor "must have been aware that its act violated the legal rights of the creditor").

Accordingly, in the Fifth Circuit, a debtor who acted with an intent to cause harm, but under the belief that such actions would not inflict a "legally cognizable injury" because the actions were justified (such as by making a statement that would tend to injure reputation, but that the debtor believed to be true), would not have inflicted a "willful and malicious" injury. By contrast, in the Ninth Circuit, a belief that the statements were true is not sufficient to render the debt dischargeable. Because the bankruptcy court's finding that Sicroff believed his statements to be true was not disturbed on appeal, and because—as Jett does not dispute (Opp. 16-17)—California law requires no more than a showing of negligence as to the truth or falsity of the statement to support a libel verdict, the split between the Fifth and Ninth Circuits is squarely presented here.

B. The Decision Below Splits With The Sixth Circuit's Decisions In *Wheeler* And *Kennedy*

Jett also recognizes the tension between the decision below and the Sixth Circuit's decision in *Wheeler*, 783 F.2d at 615, which held that "[t]he intentional tort of libel meets the requirements of § 523(a)(6) for nondischargeability when the debtor/author knows the published statements were false." Opp. 21. None of Jett's efforts to reconcile that statement with the decision below resolves the plain conflict.

First, Jett quibbles with the petition's characterization of *Wheeler* (Opp. 21-22), pointing out that the judgment of the Sixth Circuit was not an outright reversal of the determination that the debt was nondischargeable, but rather a

remand for factual findings on whether the debtor "knew the published statements were false." That remand only highlights the conflict between *Wheeler* and the decision below. As much as Jett seeks to disregard the undisturbed finding of fact that Sicroff believed his statements were true when he made them, even he cannot glean from his own *de novo* review of the record any type of "finding"—required under *Wheeler*—that Sicroff knew his statements were false.

Second, Jett argues that the Sixth Circuit's statement that a claim for libel is nondischargeable if the debtor knew the statements were false does not mean that this is the only circumstance in which the debt is nondischargeable. "It is simply wrong as a matter of law and logic to equate a statement concerning a circumstance that satisfies the requirements of section 523(a)(6) with a holding that the requirements of section 523(a)(6) are met ***only*** when such circumstance is present." Opp. 22 (double emphasis in original).

But even if the Sixth Circuit's language was ambiguous in this regard—and in context, the negative inference there is as clear as it is in the statement: "you may go when the light turns green"—any such ambiguity was clarified by the very next sentences of the opinion, which state:

> Mere reckless disregard for the truth or falsity of the statement, which can support a libel verdict, is not a willful and malicious injury for purposes of § 523(a)(6). Laudani contends that a genuine issue of material fact exists as to whether . . . Laudani recklessly disregarded the truth or . . . he knew his statements were false; *only the latter would prevent discharge of the debt.*

783 F.2d at 615 (emphasis added and citations omitted). Contrary to Jett's efforts to distort the holding of *Wheeler*, that case clearly held that a debt for libel is nondischargeable *only* when the debtor knew his statement to be false.

Finally, Jett's effort to reconcile *Wheeler* with the decision below falls back on his refrain that, notwithstanding the undisturbed finding of fact, the record does not support the conclusion that Sicroff believed his statements were true. But again, Jett cannot manufacture a "vehicle problem" by taking issue with the bankruptcy court's factual findings.

As for the Sixth Circuit's decision in *Kennedy* v. *Mustaine (In re Kennedy)*, 249 F.3d 576 (6th Cir. 2001), that case involved a circumstance where (unlike here) the debtor knew his statements were false when made. *See id.* at 581 (quoting the district court as noting that "the Kennedys continued to make the statements in question even after receiving clear proof that the statements were false"); *id.* at 582-583 ("Debtors continued to make the statements ... even after they became aware [of their falsity]"). *Kennedy* is therefore fully in accord with *Wheeler*, making clear that the Sixth Circuit rule remains the one announced in *Wheeler*: "The intentional tort of libel meets the requirements of § 523(a)(6) for non-dischargeability when the debtor/author knows the published statements were false." 783 F.2d at 615. And on the findings below as they come to this Court, the decision below is in open conflict with that rule.

* * * * *

When the underbrush is cleared away, there is a sharp division in the circuits on the question whether, under this Court's decision in *Geiger*, a debt is for "willful and malicious injury" when the debtor intentionally caused harm, but did so in the belief that the harm was legally justifiable. The Fifth Circuit has held that such conduct by an "honest but mistaken" debtor does *not* constitute "willful and malicious" injury; rather, the "willful and malicious" test is met only where the debtor intended to cause "legally cognizable injury." *Miller*, 156 F.3d at 606. The Sixth Circuit effectively gets to the same result by treating, as "just cause and excuse" under the "malicious" prong, the debtor's belief that his conduct was legally justifiable (in a libel case, the debtor's *belief* that his statement was true), even if that belief was in error. *Wheeler*, 783 F.2d at 615. The Ninth Circuit, in the decision below, breaks with these cases, treating "just cause and excuse" as applying only when the debtor's statement was in fact true, and not when the debtor harbored an honest but mistaken belief in its truth.[6]

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[6] In addition to the decisions of the Fifth and Sixth Circuits, the petition identifies a number of district and bankruptcy court decisions that

III. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S DECISION IN *GEIGER*

Certiorari is also appropriate because the decision below conflicts with *Geiger*.[7] This Court could not have been clearer: "[N]on-dischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." 523 U.S. at 61 (emphasis in original). But the Ninth Circuit said just the opposite: "[I]t is the wrongful act that must be committed intentionally rather than the injury itself." Pet. App. 8a-9a. And in support of that proposition, the Ninth Circuit expressly relied on a decision that preceded *Geiger* and stated the very rule that *Geiger* rejected. *See Murray* v. *Bammer* (*In re Bammer*), 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part definition does not require a showing of . . . an intent to injure, but rather it requires only an intentional act which causes injury."). Were it not for the substantial confusion in the lower courts over the contours of the *Geiger* principle, this plain disregard for Supreme Court authority might otherwise justify the summary reversal of the decision below. At the very least, it counsels strongly in favor of granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

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have held that one who publishes a false statement without knowledge of its falsity cannot have committed a willful and malicious injury. *See* Pet. 13 n.7. Respondent also points to a lower court opinion, *Mills* v. *Ellerbee*, 177 B.R. 731, 742 (Bankr. N.D. Ga. 1995), that has lined up on the other side of this circuit conflict. Opp. 17. Accordingly, certiorari is appropriate here not merely to correct the Ninth Circuit's decision below, but more broadly to resolve an issue that has divided the lower federal courts.

[7] Jett correctly points out that the appendix to the petition inadvertently omitted a footnote in the Ninth Circuit's decision that appears in the reported decision as amended on April 11, 2005, but that was not contained in the original opinion as filed on March 23, 2005. Opp. 5 n.4. In that footnote, the Ninth Circuit concluded that because the willfulness prong was "conceded," see *supra* p. 3 & n.2, the *Geiger* analysis did not apply. In addition to being wrong, that conclusion further conflicts with the Fifth Circuit's *Miller* decision, 156 F.3d at 605 (holding that *Geiger* "displaced" circuit precedent on the meaning of "malicious").

Respectfully submitted,

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JUNE 2005

IN THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE DAVID E. RUSSELL, JUDGE

IN RE: SETH E. SICROFF,
Debtor.

STEPHEN C. JETT,
Plaintiff and Creditor,
vs.
SETH E. SICROFF,
Defendant and Debtor.

Case No. 96-3578-C-7
Adversary No. 97-2277-C

* * * *

THE COURT: Where is Judge Klein's order?

MR. WHALEY: Your Honor, maybe I can clarify for you. My understanding is that we still have a trial date, that my client could actually win. But the purpose of today is to determine whether, because my client had to file bankruptcy, this action is discharged.

THE COURT: Yes.

MR. WHALEY: And the Court looks at it—it's obviously willful. I mean, it's an intentional act. It's "willful and malicious" that has to exist to avoid dischargeability.

And I think what the Court is saying is that I've looked at the totality of circumstances, and it's my position that without even refuting, just looking at the totality of circumstances, it's clear that my client was doing a particular thing. He was complaining to the university about closing the department, and as a result maybe he said inappropriate things about plaintiffs, but it was not done with a malicious idea. If anything, they sued him 12 days after he wrote this letter

and made this into a three-ring circus that has now continued for six years.

And so the single issue is not how much their damages are or what's going to happen. The single issue for you to decide is either he was willful and malicious and, therefore, it is not discharged and we go off back to state court and get to tell 12 jurors about this, or it doesn't reach that level of maliciousness required by bankruptcy court, which is different than our state court definition.

And that's a question of judicial impression. And that's why I'm kind of submitting this. They can put all their documents in, and my position is it's not the level of maliciousness to avoid dischargeability.

THE COURT: So, I take it that neither one of you want to bring up the issue of damages; is that right?

MR. WHALEY: I don't think we need to.

THE COURT: I'm prepared to rule today.

MR. WIENS: Well, your Honor, you asked me where the Court's order is, Exhibit 5 to the motion in limine, Court's order of February 5, 2002.

The reason this is important, because I anticipated this exact issue: do we have to put on our underlying case, I trot out all 15 witnesses that will testify that this came up from professional colleagues, all the things showing the damages to my client, bringing doctors for emotional distress. He specifically said no, only the determination that if you go back to trial and the trial finds that it was willful and malicious, it can't discharged.

And on Paragraph -- if you find Exhibit 5 -

THE COURT: Wait a minute. I've found Exhibit 5.

MR. WIENS: -- order of February 5 -

THE COURT: Yes.

MR. WIENS: -- it says: "Notice of Order for Trial. The trial will be held 2/28 with Judge Russell, 'on dischargeability issue only,'" not on the measure of my client's damages.

THE COURT: Okay.

MR. WIENS: Just if we go to trial and the jury says we find this malicious -- and did like the arbitrator, in fact found punitive damages, that that can't be discharged.

I really feel like I'm sandbagged when I talked to Judge Klein about this --

THE COURT: All right.

MR. WIENS: -- twice, that I did not have to make that evidence

THE COURT: You are correct. The order -- and the order of Judge Klein is quite clear. So the only issue before me now is whether this particular obligation was dischargeable.

MR. WIENS: And not the measure of my client's damages.

THE COURT: And not the measure of your client's damages. You are correct. Mr. Whaley apparently agrees with you.

MR. WIENS: So I think the Court has concurred -- I didn't keep track, but I think four or five times now has concurred that the specific things pointed out were, in fact, slanderous, and by definition untrue if they're slanderous, because if they're true, they're not slanderous. And by the inherent nature of making such accusations, both in written and oral form, it's inherent that those were intentional acts. In fact, Mr. Whaley has acknowledged that they were intentional acts.

THE COURT: That's correct.

MR. WIENS : And, again, maliciousness can be inferred by the fact they weren't true. I cited the California law to that effect. So I --

THE COURT: Well, what about bankruptcy law? Do you have any bankruptcy cases that say that statements such as these that were made are nondischargeable?

MR. WIENS: Well, I cited the code section that says if it's willful and malicious --

THE COURT: That's the problem. That phrase has different connotations in the bankruptcy law. You may be right, I don't know, but I don't have any authority in front me concerning that.

MR. WIENS: I don't -- willful and malicious is willful and malicious. There is no evidence he did these accidentally.

THE COURT: I know. But what you're saying now is that maliciousness is implied. Did Congress intend for that word to be overlooked when someone -- when the Court makes a determination or tries to make a determination as to whether an obligation is dischargeable or not?

There are cases. There was the Ciccini (phonetic) case which held, in effect, as I understood it, that the word "malicious" didn't mean very much. But that case has been criticized and limited, I believe, by subsequent cases of the Ninth Circuit. So I'm not sure in my own mind what the right law is in this regard.

We do know, and I acknowledged, that there have been statements that were libelous. The question is: are those kind of statements, I mean, just by themselves, sufficient to make a nondischargeable judgment. And they may very well be, I simply don't know. I don't have any case authority to examine.

MR. WIENS: Well, I was operating under the assumption, your Honor, that when you're in federal case -- court --

THE COURT: Yes.

MR. WIENS: -- on a state court claim -- this is by law a state tort action, it's not a federal type of action.

THE COURT: Correct.

MR. WIENS: -- the federal court utilizes the state law.

THE COURT: It does what to the state law?

MR. WIENS: Utilizes the state law on a particular state --

THE COURT: Well, it will utilize a state law to a certain extent, I suppose, but the nondischargeability provisions of the code are quite -- they limit -- I mean, their purpose is to limit the type of judgments that can be rendered nondischargeable. And, you know, the language of the code must be -- must be looked to in order to determine whether or not you can even have a state court judgment and -- you know, of law. I don't know if that would be nondischargeable or not. It may be.

MR. WIENS: Well, here's the problem. That's why I think Judge Klein long ago lifted the stay so we could proceed in state court, never anticipating we were going to drag through years of appeals and take this long, because we're putting the cart before the horse. It's the trier of fact that's going to determine whether these are malicious. So, not even letting us essentially -- if you say this is nondischargeable, there is no reason to have a trial. I can go to trial; the state court jury can say malicious; punitive damages; give them a million dollars of punitive damages, and you've already ruled it's dischargeable.

THE COURT: That's right.

MR. WIENS: Now you've got two conflicting opinions.

THE COURT: Not necessarily.

MR. WHALEY: Not at all. There won't be a state court trial if this is -- the whole point here is that we know this is willful, the question is: is it malicious? If it's malicious, then we go on to the next step and try the case in the summertime. If it's not malicious, then the debt is discharged and the state court action goes away, it's all over.

And I think that what I'm saying is, sure, way in the back of my mind I think I can win this case at trial, but I'm saying given all his facts, what really happened here was not malicious. You can have libel and slander, and it's not malicious, and that --

MR. WIENS: Well, that, I haven't seen any authority for that.

MR. WHALEY: That's the issue.

THE COURT: And I haven't seen any contrary authority either. I haven't had any authority from your side or from Mr. Whaley's side.

MR. WHALEY: Right. I've read annotations --

THE COURT: Unfortunately, I've never had a case of libel or slander to deal with in respect to nondischargeability. This is the first case I've had. I've been on the bench for 15 years, and this is the first case I've ever had.

MR. WIENS: And I cited the law that says -- you're never going to get a defendant to get on the stand and admit that he's malicious. You have to infer --

THE COURT: I understand that. But you're saying that it's implied in the law --

MR. WIENS: I am not saying that.

THE COURT: -- and that implication in the law is sufficient to make it a nondischargeable obligation under the Bankruptcy Code. And you may be right. I don't know. So I can either take the matter as --

MR. WIENS: The law is -- says if it's not true there is malice. The mere fact that it's not true; okay?

THE COURT: Yeah.

MR. WIENS: We've proved that.

MR. WHALEY: That's not true at all. That's not true. You can have libel and slander and it's not malicious.

THE COURT: You may be right.

MR. WIENS: I dispute that.

THE COURT: Well --

MR. WIENS: Maybe we can submit --

THE COURT: I would really appreciate it if you would, because --

MR. WIENS: Just on that specific issue.

THE COURT: Just on that specific issue, right. Because I think that from what I've been able to glean is there have been statements that were libelous.

MR. WHALEY: It's undisputed. I mean, at this point, I guess what I'm saying is why don't we give you a little brief, because I'm not -- I am conceding that for purposes of this hearing. I just think the totality of the evidence you received also shows that there was no malicious intent. And it's my understanding that "malicious" as defined by bankruptcy -- it's a bankruptcy definition.

In other words, I've read all kinds of cases, and there is all kinds of specific fraud that, if it occurs, it raises to a level of malicious. And there is some distinction between what the state court calls malicious and what the bankruptcy court calls malicious. I could -- I mean, I ran out of time, but I never did get to a libel or slander case, and —

THE COURT: That's my problem, too.

MR. WHALEY: And, in particular, there may be a particular level or description that occurs in a libel and slander case where they say, yes, this is malicious.

I guess my point in coming here today and saying: "Accept all his facts; I don't think that you've raised to that level of malicious."

THE COURT: Well, I think we have an issue here right in front of us.